Supreme Court, U.S.
FILED

No. _____ 10-239 Aug 1 2010

OFFICE OF THE CLERK

In The Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CLINT BOLICK
NICHOLAS C. DRANIAS*
GUSTAVO E. SCHNEIDER
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
telephone: (602) 462-5000
facsimile: (602) 256-7045
ndranias@goldwaterinstitute.org

Counsel for Petitioners
**Counsel of Record*

ON SALE LAW BRIEF PRINTING CO., INC. [illegible]
ORANGE COUNTY, CA 800-[illegible]

QUESTIONS PRESENTED FOR REVIEW

1.

Whether *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008), require this Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it penalizes and deters free speech by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money, or when independent expenditures are made, above a "spending limit."

2.

Whether *Citizens United* and *Davis* require this Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it regulates campaign financing in order to equalize "influence" and financial resources among competing candidates and interest groups, rather than to advance directly a compelling state interest in the least restrictive manner.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiffs-Appellees and Petitioners: John McComish; Nancy McLain; and Tony Bouie.

Plaintiff-Intervenors-Appellees and Respondents: Dean Martin; Robert Burns; Rick Murphy; Arizona Free Enterprise Club's Freedom Club PAC; and Arizona Taxpayers Action Committee, as agent of Taxpayers Action Committee.

Defendants-Appellants and Respondents: Ken Bennett, in his official capacity as Secretary of State of the State of Arizona; Gary Scaramazzo, in his official capacity as a member (Commissioner) of the Arizona Citizens Clean Elections Commission; Royann J. Parker, in her official capacity as a member (Commissioner) of the Arizona Citizens Clean Elections Commission; Jeffrey L. Fairman, in his official capacity as a member (Commissioner) of the Arizona Citizens Clean Elections Commission; Louis Hoffman, in his official capacity as a member (Commissioner) of the Arizona Citizens Clean Elections Commission; and Lori S. Daniels, in her official capacity as a member (Commissioner) of the Arizona Citizens Clean Elections Commission.

Defendant-Intervenor-Appellant and Respondent: Clean Elections Institute, Inc.

This petition has not been filed by or on behalf of a nongovernmental corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
RULE 14.1(b) STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	ix
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	7
I. The Speech Burden of Arizona's Matching Funds Trigger	8
II. The Windfall Effect of Arizona's Matching Funds Trigger	11
III. The Disconnect Between Anticorruption Purposes and Arizona's Matching Funds Trigger	12
IV. The Proceedings Below	14
REASONS FOR GRANTING THE PETITION	15
I. This case presents issues of great nationwide importance and the Ninth Circuit's decision contradicts recent decisions of this Court	15

TABLE OF CONTENTS – Continued

Page

II. There is a clear and irreconcilable split among the circuits on the issues implicated by this case, requiring resolution by this Court 19

A. The circuits clash on the speech burden of matching funds triggers 20

B. The circuits clash on the level of scrutiny applicable to matching funds triggers 22

C. The circuits clash as to whether promoting participation in public financing serves anticorruption purposes 23

D. There is a substantial risk that the circuit split will widen 25

E. This petition must be granted to avoid growing confusion over First Amendment jurisprudence 25

III. The principles enforced by the Court in *Citizens United* and *Davis* provide a clear framework for harmonizing the split between the circuits on the constitutionality of matching funds triggers 28

A. *Citizens United*'s prohibition on influence and resource leveling campaign finance regulations provides a clear framework for harmonizing the split between the circuits 29

TABLE OF CONTENTS – Continued

Page

B. *Davis* also provides a framework for harmonizing the split between the circuits by isolating the Ninth Circuit as an outlier 32

1. By tying the fate of contribution limit triggers to matching funds triggers, *Davis* makes it possible to harmonize the First, Second, Fourth, Sixth, Eighth and Eleventh Circuits 32

2. This petition should be granted because the Ninth Circuit's decision is a unique impediment to the harmonious development of First Amendment jurisprudence under *Davis* 34

CONCLUSION 35

APPENDIX

Judgment Entered by the U.S. Court of Appeals for the Ninth Circuit, entered May 21, 2010 ..... App. 1

Order and Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit Reversing Judgment in Favor of Plaintiffs, filed May 21, 2010, Amended June 23, 2010 ..... App. 2

Judgment Entered by the U.S. District Court for the District of Arizona in Favor of Plaintiffs, entered Jan. 21, 2010 ..... App. 46

TABLE OF CONTENTS – Continued

Page

Order of the U.S. District Court for the District of Arizona granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment, filed Jan. 20, 2010 ..... App. 47

Order of the U.S. Supreme Court granting Joint Second Renewed Emergency Application to Vacate Stay, filed June 8, 2010 ..... App. 81

Order of the U.S. Supreme Court denying Renewed Emergency Application to Vacate Stay, filed June 1, 2010 ..... App. 82

Order of the U.S. Supreme Court denying Emergency Application to Vacate Stay, Feb. 16, 2010 ..... App. 83

Order of the U.S. Court of Appeals for the Ninth Circuit Motions Panel Extending Stay, filed Feb. 1, 2010 ..... App. 84

Order of the U.S. Court of Appeals for the Ninth Circuit denying Emergency Motion to Vacate Stay Pending Appeal, Filed Jan. 29, 2010 ..... App. 90

Findings of Fact and Conclusions of Law of the U.S. District Court for the District of Arizona in support of denial of Plaintiffs' Motion for Preliminary injunction, filed Oct. 17, 2008 ..... App. 92

Order of the U.S. District Court ..... App. 120

Text of First Amendment to U.S. Constitution ..... App. 134

TABLE OF CONTENTS – Continued

Page

Text of Fourteenth Amendment to U.S. Constitution ..... App. 134

Text of 42 U.S.C. § 1983 ..... App. 137

Text of Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. Ann. §§ 16-940 to 16-961 .... App. 138

Excerpts from Transcript of Proceedings before Arizona Citizens Clean Elections Commission on June 9, 2010 ..... App. 182

Selections from Sept. 15, 2008 Deposition of Plaintiff Nancy McLain ..... App. 190

Selections from Sept. 18, 2008 Deposition of Corporation Commission Candidate Paul B. Newman (omitting exhibits 1 and 2) ..... App. 198

Declaration of Plaintiffs' Expert Dr. Marcus Osborn (omitting Exhibits 1 through 14) .... App. 223

Declaration of Law Intern Jeffrey Ober in Opposition to Defendants/Defendant-Intervenor's Motions for Summary Judgment (omitting exhibits 1 through 10) ..... App. 277

Rebuttal Declaration of Plaintiff Tony Bouie in Support of Second Motion for Preliminary Injunction ..... App. 295

Rebuttal Declaration of Tony Bouie in Support of Plaintiffs' Motion for Summary Judgment .... App. 298

Declaration of Plaintiff Tony Bouie in Support of Plaintiffs' Motion for Summary Judgment (omitting exhibits) ..... App. 304

TABLE OF CONTENTS – Continued

Page

Declaration of Plaintiff John McComish in Support of Plaintiffs' Motion for Summary Judgment (omitting exhibits 1 and 4)..... App. 321

TABLE OF AUTHORITIES

Page

CASES:

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) 27

Buckley v. Valeo, 424 U.S. 1 (1976) 16

Citizens United v. Federal Election Comm'n, 130 S. Ct. 876 (2010) ..... *passim*

Daggett v. Comm'n on Gov't Ethics, 205 F.3d 445 (1st Cir. 2000) ..... *passim*

Davis v. Federal Election Comm'n, 128 S. Ct. 2759 (2008) ..... *passim*

Day v. Holloran, 34 F.3d 1356 (8th Cir. 1994) ..... *passim*

Elrod v. Burns, 427 U.S. 347 (1976) 27

Federal Election Comm'n v. Wisconsin Right to Life, 551 U.S. 449 (2007) 31

Gable v. Patton, 142 F.3d 940 (6th Cir. 1998) ..... *passim*

Green Party of Conn. v. Garfield, Nos. 09-3760-cv(L), 09-3941-cv(CON), 2010 WL 2737153, 2010 U.S. App. LEXIS 14286 (2nd Cir. 2010) ..... *passim*

Grosjean v. American Press Co., 297 U.S. 233 (1936) 26

Laird v. Tatum, 408 U.S. 1 (1972) 27

N.C. Right to Life, Inc. v. Leake, 524 F.3d 427 (4th Cir. 2008) ..... *passim*

Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) 16, 17

TABLE OF AUTHORITIES – Continued

Page

Rostker v. Goldberg, 448 U.S. 1306 (1980) 19

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 26, 27

Scott v. Roberts, No. 10-1321, 2010 WL 2977614, 2010 U.S. App. LEXIS 15897 (11th Cir. 2010) ..... *passim*

Speiser v. Randall, 357 U.S. 513 (1958) 27

W. Airlines, Inc. v. Int'l Brotherhood of Teamsters, 480 U.S. 1301 (1987) 18

Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995) 33

CONSTITUTIONAL PROVISIONS:

First Amendment to the United States Constitution ..... *passim*

Fourteenth Amendment to the United States Constitution 2, 8, 14

STATUTES:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 2, 14

ARIZ. REV. STAT. § 16-940 ..... 2, 7, 11, 29, 30

ARIZ. REV. STAT. § 16-940(A)-(B) 17

ARIZ. REV. STAT. § 16-952 17

ARIZ. REV. STAT. § 16-952(A)-(C) 4, 7

TABLE OF AUTHORITIES – Continued

Page

ARIZ. REV. STAT. § 16-954(F) 30

ARIZ. REV. STAT. § 16-961 2

CONN. GEN. STAT. §§ 9-700 to 9-759 (2009) 17

FLA. STAT. §§ 106.30-106.36 (2009) 17

MASS. GEN. LAWS ANN. ch. 55C, §§ 1-12 (2010) 18

ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (2009) 17

N.C. GEN. STAT. §§ 163-278.61 to 163-278.70 (2010) 18

N.M. STAT. §§ 1-19A-1 to 1-19A-17 (2010) 18

R.I. GEN. LAWS §§ 17-25-1 to 17-25-30 (2010) 18

WIS. STAT. ANN. §§ 11.50-11.522 (2010) 18

2007 New Jersey Fair and Clean Elections Pilot Project Act, Pub. L. No. 2007, c. 60 (2007) 18

OTHER AUTHORITIES:

Adam Doster, *Public Financing on the Horizon?*, Progress Illinois, July 23, 2010, http://www.progressillinois.com/quick-hits/content/2010/07/23/public-financing-horizon 18

Richard Epstein, *The Supreme Court, 1987 Term – Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-8, 73-102 (1988) 27

TABLE OF AUTHORITIES – Continued

Page

National Conference of State Legislatures, http://www.ncsl.org/default.aspx?TabId=20454 (last visited Aug. 12, 2010) 18

Understanding Connecticut Campaign Finance Laws: A Guide for 2008 General Assembly Candidates Participating in the Citizens' Election Program, at 2 (2008), available at http://www.ct.gov/seec/lib/seec/publications/cep_guide_june_2008_final_auto.pdf (last visited August 12, 2010) 30

Wis. Right to Life Political Action Comm. v. Brennan, No. 09-cv-764-vis, 2010 WL 933809, 2010 U.S. Dist. LEXIS 22863 (W.D. Wis. Mar. 11, 2010) 25

PETITION FOR WRIT OF CERTIORARI

John McComish, Nancy McLain and Tony Bouie respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The merits decision of the court of appeals was originally reported at 605 F.3d 720. The original decision, however, was subsequently amended to include a revised footnote 1, which corrected factual misstatements concerning former Arizona Governor John Fife Symington. The amended merits decision is not officially reported, but is available at 2010 WL 2595288 and 2010 U.S. App. LEXIS 13032, and is reproduced in the Appendix at 2-45. The decision of the U.S. District Court for the District of Arizona is not officially reported, but is available at 2010 WL 2292213 and 2010 U.S. Dist. LEXIS 4932, and is reproduced in the Appendix at 47-80.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2010 (the amended merits decision did not result in the issuance of an amended judgment). Pet. App. 1. This petition has been filed within 90 days of

May 21, 2010. Accordingly, the Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, as well as ARIZ. REV. STAT. ("A.R.S.") §§ 16-940 through 16-961 (full statements of each of these constitutional and statutory provisions are reproduced in the Appendix at 134-81).

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .

A.R.S. § 16-940 provides:

Findings and declarations

A. The people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.

B. The people of Arizona find that our current election-financing system:

1. Allows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;

2. Gives incumbents an unhealthy advantage over challengers;

3. Hinders communication to voters by many qualified candidates;

4. Effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests;

5. Undermines public confidence in the integrity of public officials;

6. Costs average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors;

7. Drives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and

8. Requires that elected officials spend too much of their time raising funds rather than representing the public.

A.R.S. § 16-952 provides:

Equal funding of candidates

A. Whenever during a primary election period a report is filed, or other information comes to the attention of the commission, indicating that a nonparticipating candidate who is not unopposed in that primary has made expenditures during the election cycle to date exceeding the original primary election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate in the same party primary as the nonparticipating candidate an amount equal to any excess of the reported amount over the primary election spending limit as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses and less the amount of early contributions raised for that participating candidate for that office as prescribed by section 16-945. The primary election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

B. Whenever during a general election period a report has been filed, or other information comes to the attention of the commission, indicating that the amount a nonparticipating candidate who is not unopposed has received in contributions during the election cycle to date less the amount of expenditures the nonparticipating candidate made through the end

of the primary election period exceeds the original general election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate qualified for the ballot and seeking the same office as the nonparticipating candidate an amount equal to any excess of the reported difference over the general election spending limit, as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses. The general election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

C. For the purposes of subsections A and B of this section, the following expenditures reported pursuant to this article shall be treated as follows:

1. Independent expenditures against a participating candidate shall be treated as expenditures of each opposing candidate, for the purpose of subsection A of this section, or contributions to each opposing candidate, for the purpose of subsection B of this section.

2. Independent expenditures in favor of one or more nonparticipating opponents of a participating candidate shall be treated as expenditures of those nonparticipating candidates, for the purpose of subsection A of this section, or contributions to those nonparticipating candidates, for the purpose of subsection B of this section.

3. Independent expenditures in favor of a participating candidate shall be treated, for every opposing participating candidate, as though the independent expenditures were an expenditure of a nonparticipating opponent, for the purpose of subsection A of this section, or a contribution to a nonparticipating opponent, for the purpose of subsection B of this section.

4. Expenditures made during the primary election period by or on behalf of an independent candidate or a nonparticipating candidate who is unopposed in a party primary shall be deducted from the total amount of monies raised for purposes of determining the amount of equalizing funds, up to the amount of primary funds received by the participating candidate. Equalizing funds pursuant to subsection B of this section shall then be calculated and paid at the start of the general election period.

5. Expenditures made before the general election period that consist of a contract, promise or agreement to make an expenditure during the general election period resulting in an extension of credit shall be treated as though made during the general election period, and equalizing funds pursuant to subsection B of this section shall be paid at the start of the general election period.

6. Expenditures for or against a participating candidate promoting or opposing more than one candidate who is not running for the same office shall be allocated by the commission among candidates for

different offices based on the relative size or length and relative prominence of the reference to candidates for different offices. . . .

STATEMENT OF THE CASE

This case seeks to vindicate the constitutional principles applied in *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008). At issue is the matching funds trigger, A.R.S. § 16-952(A)-(C), of the so-called Arizona Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq*. This provision triggers government money grants that match every dollar of private campaign contributions or expenditures made in support of a "traditional" candidate above a "spending limit" with nearly a dollar of government subsidies to opposing candidates who are "participating" in Arizona's government campaign financing system. *See* ARIZ. REV. STAT. § 16-952(A)-(C). The United States Court of Appeals for the Ninth Circuit defied *Citizens United* and *Davis* when it upheld Arizona's matching funds trigger as imposing only an insubstantial burden on the exercise of First Amendment rights, reversing the district court's permanent injunction on A.R.S. § 16-952(A)-(C).

On June 8, 2010, this Court entered an order blocking the Ninth Circuit's decision from taking effect. Pet. App. 81. The order stayed the mandate from the decision and lifted the appellate stay on the

district court's permanent injunction on Arizona's matching funds trigger. It thereby ensured that matching funds would not be distributed in Arizona during the pendency of this petition.

Subsequent decisions arising from the Second and Eleventh Circuits have followed suit, enjoining Connecticut and Florida's equivalent matching funds triggers. *Green Party of Conn. v. Garfield*, Nos. 09-3760-cv(L), 09-3941-cv(CON), 2010 WL 2737153, *25-*28, 2010 U.S. App. LEXIS 14286, *77-*86 (2nd Cir. 2010); *Scott v. Roberts*, No. 10-1321, 2010 WL 2977614, *10-*14, 2010 U.S. App. LEXIS 15897, *29-*42 (11th Cir. 2010). This has resulted in a three-to-four circuit split as to whether matching funds triggers violate the First and Fourteenth Amendments. *Compare id.*; *Day v. Halloran*, 34 F.3d 1356, 1359-60 (8th Cir. 1994); *with N.C. Right to Life, Inc. v. Leake*, 524 F.3d 427, 438 (4th Cir. 2008); *Daggett v. Comm'n on Gov't Ethics*, 205 F.3d 445, 466-72 (1st Cir. 2000); *Gable v. Patton*, 142 F.3d 940, 947 (6th Cir. 1998).

I. The Speech Burden of Arizona's Matching Funds Trigger.

1. The Ninth Circuit's decision misstates the facts when it asserts Petitioners did not identify a single time when they refrained from making expenditures or contributions because of Arizona's matching funds trigger. Pet. App. 28-33. In fact, Petitioners identified numerous specific examples of Arizona's matching funds trigger causing them to refrain from

making specific expenditures or receiving specific contributions. Pet. App. 243-50. These were not isolated occurrences, but rather they represent a general course of conduct among traditional candidates and their supporters as established by expert testimony, a peer reviewed academic study, and voluminous testimony from numerous party and non-party witnesses. Pet. App. 230-55.

2. Vividly recalling her husband's exclamation, "[t]hat's the craziest thing I've ever heard of," Petitioner Nancy McLain testified that she decided not to self-finance her campaign during Arizona's 2004 election cycle after she and her husband discussed how Arizona's matching funds trigger would give a like amount to opposing participating candidates. Pet. App. 192, 195. Petitioner McLain further testified that the threat of Arizona's matching funds trigger forced her to decide not to raise any more contributions during the 2008 general election. Pet. App. 195-97.

3. Petitioner Tony Bouie testified that he "made a decision to minimize and delay campaign expenditures after seeing the full impact of" triggering matching funds to his opponents and "decided to wait until the last possible minute . . . to spend money" on his campaign. Pet. App. 300, 303, 311. Bouie's fear of Arizona's matching funds trigger is so profound that, for the 2010 election cycle, he chose to run for an office in which he did not face competition from a participating candidate. Pet. App. 296-97.

4. Reeling from a deluge of hostile speech financed by his campaign expenditures and independent expenditures through Arizona's matching funds trigger, McComish decided not to spend money on an "auto-dialer" campaign marketing program for fear of triggering matching funds to his opponents. Pet. App. 247-48, 328-29. Spending $2,500 on the auto-dialer program would have triggered matching funds in the aggregate amount of nearly $7,500 to McComish's participating opponents. Pet. App. 248.

5. Petitioners are not alone in finding their exercise of First Amendment rights penalized and chilled. Expert witness Dr. Marcus Osborn reviewed all of the evidence in the record and found that "[f]irst time candidates, veteran candidates, sophisticated independent expenditure committees and even a member of the Clean Elections Commission all confirmed in their interviews or testimony that the matching funds component of the Clean Election[s] Act created a drag or 'chilling effect' on their campaign fundraising and expenditures that tended to restrict and delay campaign fundraising and spending." Pet. App. 231. As explained by Dr. Osborn, this chilling effect arises because the "matching funds component impose[s] a significant 'cost,' or competitive disadvantage, on traditional candidates with respect to raising and spending money that would not exist in a world without matching funds." Pet. App. 253.

6. Consistent with Petitioners' testimony and Dr. Osborn's expert opinion, average per capita

expenditures in Arizona by traditional legislative candidates of major parties declined 6% in real terms between 1998 and 2006. Pet. App. 290. And per capita growth of independent expenditure spending in Arizona has lagged per capita growth of PAC spending nationally by *at least* 33% between 1998 and 2006. Pet. App. 285-86.

II. The Windfall Effect of Arizona's Matching Funds Trigger.

1. Arizona's matching funds trigger is a component of the Arizona Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq.*, which is expressly premised on the goal of equalizing resources and disproportionate influence among competing candidates and interest groups. However, despite its resource and influence equalizing purpose, Arizona's matching funds trigger typically generates a windfall of campaign resources for participating candidates.

2. For example, because Petitioner McComish faced three participating opponents in the 2008 Arizona primary, every dollar he spent above his "spending limit" triggered nearly three dollars to be spent against his candidacy. Pet. App. 247-49. As a result, Petitioner McComish watched his three participating opponents collectively receive $140,227.98 in public financing, which included $82,081.98 in matching funds triggered by campaign expenditures made by McComish and independent expenditure committees above the applicable $19,382.00 "spending limit." Pet. App. 328.

3. The same windfall effect for opposing participating candidates arises from matching funds triggered by independent expenditures. For example, the Arizona Realtors Association made an independent expenditure in the amount of $6,500 ostensibly to support Petitioner McComish, which triggered $18,330 in the aggregate to his three competing participating opponents. Pet. App. 327-28.

4. As a result of these and other windfall effects, during Arizona's 2006 legislative election cycle, participating candidates, on average, received and spent: a) nearly $5,000 more (nearly 30% more) than traditional candidates during the primary election; and b) nearly $12,000 more (nearly 136% more) than traditional candidates during the general election. Pet. App. 291.

5. For traditional candidates and their supporters, the windfall effect of Arizona's matching funds trigger generates the fear that the government will finance overwhelming amounts of hostile speech against them if they exercise their First Amendment rights. Pet. App. 247-49, 326-29.

III. The Disconnect between Anticorruption Purposes and Arizona's Matching Funds Trigger.

1. Dr. Osborn has opined that Arizona has already established adequate regulations to prevent the appearance and actuality of corruption from private contributions. Pet. App. 109, 253-75. Arizona's

matching funds trigger does nothing that could further enhance the prevention of actual or apparent corruption in Arizona's electoral system. Pet. App. 264.

2. In fact, candidates, individuals and interest groups manipulate Arizona's matching funds trigger to generate the functional equivalent of unlimited and undisclosed private contributions to participating candidates. Pet. App. 270-75. Arizona's matching funds trigger thereby replicates and augments whatever actual or apparent corruption may be associated with completely unregulated private campaign financing. Pet. App. 271.

3. For example, wealthy individuals can bypass contribution limits and disclosure requirements by running as self financed candidates in the same race as one or more favored participating candidates in order to trigger matching funds to those participating candidates. Pet. App. 271-72. Sam George's self-financed traditional candidacy for Arizona Corporation Commissioner, which triggered nearly a million dollars to participating candidates, with whom he coordinated campaign strategy, clearly had this appearance. Pet. App. 200, 202-05, 211-12, 214-15, 218-22, 272.

4. Similarly, individuals and special interests can directly fund traditional candidates with the expectation that, by doing so, they will trigger matching funds to favored participating candidate(s), bypassing contribution limits and disclosure regulations. Pet. App. 271-72. Corporation Commissioner Paul

Newman testified that this is what the energy industry appeared to do during the 2008 election cycle when he heard that Republicans were running a "team" of traditional and participating candidates for Corporation Commission. Pet. App. 200-02, 205-08.

IV. The Proceedings Below.

1. Based on federal question jurisdiction, Fourteenth Amendment incorporation doctrine and 42 U.S.C. § 1983, the district court previously ruled three times that Arizona's matching funds trigger provision violates the First Amendment under *Davis*. Pet. App. 67-72, 101-15, 124-29. Although the district court initially refrained from issuing preliminary injunctive relief due to ongoing elections, the court's rulings were ultimately finalized in the permanent injunction entered by the district court on January 20, 2010, which barred enforcement of Arizona's matching funds trigger. Pet. App. 80. But in a bare decision entered on February 1, 2010, the Ninth Circuit's motions panel stayed enforcement of the district court's permanent injunction pending unspecified action by the merits panel. Pet. App. 84-85.

2. Circuit Judge Bea dissented from the bare stay decision with a detailed explanation spanning five pages emphasizing that Arizona's matching funds triggers clearly violated the principles enforced in *Citizens United* and *Davis*. Pet. App. 86-87. Nevertheless, the Ninth Circuit's merits decision later reversed the district court's permanent injunction on Arizona's

matching funds trigger. Pet. App. 39. This petition seeks review of that decision.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for three reasons: 1) as was implicitly recognized by the Court in its June 8, 2010 decision to restore the district court's injunction on Arizona's matching funds trigger, this case presents issues of great nationwide importance and the Ninth Circuit's decision contradicts recent decisions of this Court; 2) there is a clear and irreconcilable split among the circuits on these issues, requiring resolution by this Court; and 3) the principles enforced by the Court in *Citizens United* and *Davis* provide a perfect framework for harmonizing the split between the circuits.

1. This case presents issues of great nationwide importance and the Ninth Circuit's decision contradicts recent decisions of this Court.

The Ninth Circuit Court of Appeals has refused to recognize that the government may not single out, punish and deter the exercise of First Amendment rights by causing the campaign financing efforts of traditional candidates and their supporters to produce fundraising advantages for their political opponents. The Ninth Circuit has thereby defied the core

constitutional principles applied in *Citizens United* and *Davis*.

Specifically, in *Davis*, the Court embraced *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986), and held that the government violates the First Amendment when it devises a regulatory scheme that punishes and deters the exercise of First Amendment rights. *Davis*, 128 S. Ct. at 2772. The Court further held that campaign finance regulations cannot be rigged to equalize financial resources by triggering competitive disadvantages that will create a "drag" on the robust exercise of First Amendment rights. *Id.* And in *Citizens United*, the Court reaffirmed and reiterated *Davis*' disapproval of resource equalization among candidates as a justification for campaign finance regulations by underscoring that the government may not devise campaign regulatory schemes that prohibit or burden free speech by disfavored groups to "balance" disproportionate resources or influence. *Citizens United*, 130 S. Ct. at 905-10. The Court emphasized, however, that this was not really a new rule of law, but rather was one that traced at least as far back as *Buckley v. Valeo*, 424 U.S. 1, 48 (1976), which rejected "the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'" *Citizens United*, 130 S. Ct. at 904.

Contrary to *Citizens United* and *Davis*, Arizona's matching funds trigger is expressly premised on the goal of equalizing resources and disproportionate

influence among competing candidates and interest groups. *See* ARIZ. REV. STAT. §§ 16-940(A)-(B), 16-952 ("Equal funding of candidates"). Contrary to *Davis*, Arizona's matching funds trigger ensures the robust exercise of First Amendment rights will trigger competitive disadvantages for traditional candidates and their supporters, including independent expenditure committees. Pet. App. 67-68, 105-06, 128-29, 234-35, 252-54. And contrary to *Davis*' embrace of *Pacific Gas & Elec. Co.*, by tying public funding to an opponent's exercise of First Amendment rights, Arizona's matching funds trigger effectively forces traditional candidates and their supporters to disseminate hostile speech by opposing participating candidates. Pet. App. 105-06. Taken together, the Ninth Circuit's merits decision clearly defies *Citizens United* and *Davis*. Such defiance has nationwide importance because its effects cannot be confined to the Ninth Circuit, much less Arizona.

Arizona is not alone in rigging its electoral system to trigger government subsidies to participating candidates based on the exercise of First Amendment rights by traditional candidates and their supporters. Although labeled differently, similar trigger provisions exist (or have existed) in public financing schemes throughout the United States, including in Connecticut, Florida, Maine, Massachusetts, New Jersey, New Mexico, North Carolina, Rhode Island, and Wisconsin. *See* CONN. GEN. STAT. §§ 9-700 to 9-759 (2009); FLA. STAT. §§ 106.30-106.36 (2009); ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (2009);

MASS. GEN. LAWS ANN. ch. 55C, §§ 1-12 (2010); The 2007 New Jersey Fair and Clean Elections Pilot Project Act, Pub. L. No. 2007, c. 60 (2007); N.M. STAT. §§ 1-19A-1 to 1-19A-17 (2010); N.C. GEN. STAT. §§ 163-278.61 to 163-278.70 (2010); R.I. GEN. LAWS §§ 17-25-1 to 17-25-30 (2010); WIS. STAT. ANN. §§ 11.50-11.522 (West 2010). And while California recently rejected a ballot proposal to establish a similar scheme, campaign finance regulation advocates in Illinois are reportedly promoting a version of the matching funds trigger. *Compare* National Conference of State Legislatures, http://www.ncsl.org/default.aspx?TabId=20454 (last visited Aug. 12, 2010), *with* Adam Doster, *Public Financing on the Horizon?*, Progress Illinois, July 23, 2010, http://www.progressillinois.com/quick-hits/content/2010/07/23/public-financing-horizon.

If the Ninth Circuit's defiance were allowed to stand, nationwide confusion over the constitutionality of matching funds triggers would spread and reign supreme. Fortunately, on June 8, 2010, this Court took a strong step towards establishing uniformity in the law by blocking the distribution of matching funds to participating candidates in Arizona. Pet. App. 81. By vacating the stay imposed by the Ninth Circuit on the district court's decision to enjoin Arizona's matching funds trigger, the Court implicitly ruled that the Ninth Circuit was "demonstrably wrong" to allow the disbursement of matching funds to government-subsidized candidates during Arizona's 2010 election cycle. *Quoting W. Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987)

(O'Connor, J., in chambers). And by staying the issuance of the mandate from the Ninth Circuit's merits decision (after requesting Petitioners to represent that they would timely file this petition – *see* Pet. App. 82), the Court implicitly confirmed that it was likely to grant certiorari. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (observing grant of stay requires "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"). The Court thereby signaled strong support for both granting this petition and establishing a uniform rule for the treatment of matching funds triggers. This petition should be granted because, as discussed below, the need for the Court to provide such guidance has only grown since June 8, 2010.

II. There is a clear and irreconcilable split among the circuits on the issues implicated by this case, requiring resolution by this Court.

Citing this Court's June 8, 2010 order, the Second Circuit rejected the Ninth Circuit's analysis as "unpersuasive." *Green Party of Conn.*, 2010 WL 2737153, at *27 n.19, 2010 U.S. App. LEXIS 14286, at *83 n.19. The Eleventh Circuit likewise refused to follow the Ninth Circuit or the decisions of the First and Fourth Circuits, which upheld matching funds triggers prior to this Court's rulings in *Davis* and *Citizens United*. *Scott*, 2010 WL 2977614, at *10-*12, 2010 U.S. App.

LEXIS 15897, at *29-*34. Instead, the Second and Eleventh Circuits have enjoined Connecticut and Florida's versions of Arizona's matching funds trigger. In so doing, they have sided with the prescient Eighth Circuit decision of *Day*, 34 F.3d at 1359-60, which was cited approvingly in *Davis* for striking down Minnesota's matching funds trigger. 128 S. Ct. at 2272.

As a result, a stand-off exists between and among a majority of the circuit courts that are responsible for reviewing constitutional challenges to state law. Specifically, three circuits have struck down matching funds triggers and four circuits have upheld them, with the post-*Davis* majority rule being that matching funds triggers are unconstitutional. But the split between the circuits goes much deeper than the outcomes of their decisions. As discussed below, the circuits clash on every level of constitutional analysis implicated by matching funds triggers.

A. The circuits clash on the speech burden of matching funds triggers.

The Second, Eighth and Eleventh Circuits hold that matching funds triggers impose a substantial burden that punishes and deters the exercise of First Amendment rights by effectively coercing individuals and groups to finance hostile speech by participating candidates. *Scott*, 2010 WL 2977614, at *10-*12, 2010 U.S. App. LEXIS 15897, at *29-*34; *Green Party of Conn.*, 2010 WL 2737153, at *26-*28, 2010 U.S. App.

LEXIS 14286, at *80-*86; *Day*, 34 F.3d at 1359-60. Both the Second and Eleventh Circuits emphasize that matching funds triggers are "harsher than the penalty in *Davis*," as they leave "no doubt" that the participating opponents of traditional candidates "will receive additional money." *Scott*, 2010 WL 2977614, at *12, 2010 U.S. App. LEXIS 15897, at *33 (citing *Green Party of Conn.*, 2010 WL 2737153, at *26, 2010 U.S. App. LEXIS 14286, at *82). The Eighth Circuit further holds that matching funds triggers amount to content-based speech regulations because they are triggered only by campaign expenditures and contributions that communicate support for traditional candidates or opposition for participating candidates. *Day*, 34 F.3d at 1360-61.

The Ninth Circuit rejects this analysis, contending that the burden imposed by matching funds triggers is merely an insubstantial "strategic" choice. Pet. App. 28-35. The First and Fourth Circuits appear to have declared that matching funds triggers impose *no burden* on First Amendment rights. *Daggett*, 205 F.3d at 464 (holding matching funds trigger did "not create a burden on speakers' First Amendment rights"); *Leake*, 524 F.3d at 437 (holding "[w]e conclude that the state's provision of matching funds does not burden the First Amendment rights of nonparticipating candidates . . . or independent entities . . . that seek to make expenditures on behalf of nonparticipating candidates"). And the Sixth Circuit simply sidesteps the issue, declaring bluntly that it

would "not second guess the Kentucky legislature by applying a 'scalpel.'" *Gable*, 142 F.3d at 947-49.

B. The circuits clash on the level of scrutiny applicable to matching funds triggers.

The dispute over the burden imposed by matching funds triggers has led to a split between the circuits as to the level of scrutiny to apply and whether matching funds triggers survive *any* level of scrutiny. The Second, Eighth and Eleventh Circuits each applied strict scrutiny and each struck down matching funds triggers for not advancing anticorruption purposes in a narrowly-tailored manner. *Scott*, 2010 WL 2977614, at *10-*12, 2010 U.S. App. LEXIS 15897, at *29-*34; *Green Party of Conn.*, 2010 WL 2737153, at *26-*28, 2010 U.S. App. LEXIS 14286, at *80-*86; *Day*, 34 F.3d at 1359-62. The Eighth Circuit even went so far as to declare that "[t]he statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny." *Day*, 34 F.3d at 1362.

By contrast, the First, Fourth and Sixth Circuits simply upheld Kentucky, Maine and North Carolina's matching funds triggers without clearly articulating any level of scrutiny. *Daggett*, 205 F.3d at 464; *Leake*, 524 F.3d at 437; *Gable*, 142 F.3d at 947-49. The Ninth Circuit, however, preferred to apply intermediate scrutiny, holding that Arizona's matching funds trigger is sufficiently well-tailored to important

governmental interests because it encourages participation in public campaign financing. Pet. App. 34-38.

C. The circuits clash as to whether promoting participation in public financing serves anticorruption purposes.

The adoption of differing levels of scrutiny (or none at all), however, has not avoided clashes between the circuits on discrete issues related to the level of scrutiny. Significantly, the rulings of the Second, Eighth and Eleventh Circuits clash with the assertion of the Ninth Circuit that the encouragement of participation in public campaign financing advances anticorruption purposes. *Compare Scott*, 2010 WL 2977614, at *10-*12, 2010 U.S. App. LEXIS 15897, at *29-*34; *Green Party of Conn.*, 2010 WL 2737153, at *26-*28, 2010 U.S. App. LEXIS 14286, at *80-*86; *Day*, 34 F.3d at 1359-62, *with* Pet. App. 34-38.

In particular, contrary to the Ninth Circuit, the Eleventh Circuit has ruled that matching funds triggers are primarily aimed at equalizing resources and influence among candidates and interest. *Compare* Pet. App. 11-12 *with Scott*, 2010 WL 2977614, at *13, 2010 U.S. App. LEXIS 15897, at *37 (observing "[a]t bottom, the Florida public campaign financing system appears primarily to advantage candidates with little money or who exercise restraint in fundraising . . . the system levels the electoral playing field, and that purpose is constitutionally problematic"). The Eleventh Circuit also rejects the Ninth

Circuit's apparent notion that promoting participation in public campaign financing necessarily serves anticorruption purposes when private campaign financing is already stringently regulated. *Scott*, 2010 WL 2977614, at *13-*14, 2010 U.S. App. LEXIS 15897, at *37-*40 ("As we have explained, in Florida, every candidate for public office, whether participating or not, is subject to a $500 limit on campaign contributions. . . . And when contributions are so limited, the Supreme Court has told us that a limit on general campaign expenditures does not serve the anticorruption interest. . . . Florida, in the light of the election laws it has adopted, cannot impose a 'special and potentially significant burden,' . . . on the First Amendment rights of nonparticipating candidates who do not wish, for whatever reason, to accept public money and its attendant limitations on the theory that its public financing system reduces actual or apparent corruption") (citations omitted). Finally, the Eleventh Circuit clashes with the Ninth Circuit as to the existence of less-restrictive alternatives to the matching funds trigger. *Compare* Pet. App. 37-38 *with Scott*, 2010 WL 2977614, at *13-*14, 2010 U.S. App. LEXIS 15897, at *39-*41 ("Florida could encourage participation to virtually the same degree that it maintains it currently does by doing no more than releasing participating candidates from the expenditure ceiling.").

D. There is a substantial risk that the circuit split will widen.

The stand-off between and among the First, Second, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits is not likely to remain a detente. In an ongoing challenge to the matching funds trigger codified in Wisconsin law, the Seventh Circuit will soon be forced to choose which line of cases to follow. *See Wis. Right to Life Political Action Comm. v. Brennan*, No. 09-cv-764-vis, 2010 WL 933809, *1-*2, 2010 U.S. Dist. LEXIS 22863, *1-*4, (W.D. Wis. Mar. 11, 2010). Although the post-*Citizens United* and *Davis* majority rule is that matching funds triggers are unconstitutional, the depth of the jurisprudential dispute between the circuits is so great that there is a substantial risk that the circuit split will widen, rather than heal, over time. The Ninth Circuit's defiance of *Citizens United* and *Davis* shows that the logic of existing Supreme Court precedent will not alone persuasively harmonize the circuits.

E. This petition must be granted to avoid growing confusion over First Amendment jurisprudence.

Under these circumstances, especially after the entry of this Court's June 8, 2010 order, denying the instant petition would only engender more confusion among the circuits as to the constitutionality of matching funds trigger provisions. And this confusion will inevitably infect other critically important areas of constitutional law.

For example, the Ninth Circuit has asserted that the burden imposed on traditional candidates and their supporters by Arizona's matching funds trigger is insubstantial because it only requires a "strategic" choice to be made. Pet. App. 28-35. Concededly, Arizona's matching funds trigger does present a choice to traditional candidates and their supporters – either stop raising and spending money to project your political message to the public or do so and finance your opponent's dissemination of hostile speech against you. But labeling such decisions "strategic," does not alter the fact that, for candidates competing in the hurly-burly of electoral politics, the choice presented by the matching funds trigger is often no different than "your money or your (political) life." Pet. App. 230-54. Settled law stands against the government imposing, through the threat of matching funds, a burden on decision processes concerning the exercise of core free speech rights that should be left free and uninhibited under the First Amendment.

It is well-established that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990); *see also Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936) ("[t]he evils to be prevented [by the First Amendment] were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their

rights as citizens") (citations omitted). One corollary of this principle is the doctrine of unconstitutional conditions, which generally prohibits the government from forcing individuals to choose between exercising their First Amendment rights and receiving government benefits. *Speiser v. Randall*, 357 U.S. 513, 518-19, 526 (1958) (holding First Amendment bars conditioning of tax exemption on showing that taxpayer had not engaged in subversive advocacy, observing to hold otherwise would allow the government to "produce a result which [it] could not command directly"); *see also Elrod v. Burns*, 427 U.S. 347, 362 (1976) (holding "[t]he denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly"); *see generally* Richard Epstein, *The Supreme Court, 1987 Term – Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-8, 73-102 (1988). Another corollary is that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *see also Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75 (1996).

The "strategic" choice presented to traditional candidates and their supporters by Arizona's matching funds trigger is not less burdensome than the burdens these settled constitutional doctrines generally prohibit the government from imposing on the choices of individuals and groups. *See, e.g., Rutan*, 497 U.S.

at 76 (observing, despite the choice to seek public employment, "the First Amendment . . . protects state employees not only from patronage dismissals but also from 'even an act of retaliation *as trivial as failing to hold a birthday party* for a public employee . . . when intended to punish her for exercising her free speech rights'") (citation omitted) (emphasis added). Consequently, the Ninth Circuit's declaration that Arizona's matching funds trigger imposes only an "insubstantial" burden on the exercise of First Amendment rights, and the First and Fourth Circuit's assertion that *no burden is imposed*, threaten to create confusion that could undermine the application of well-settled First Amendment jurisprudence. *Compare* Pet. App. 28-35 *with Daggett*, 205 F.3d at 464; *Leake*, 524 F.3d at 437. As the ultimate guardian of uniformity in constitutional law, the Court should grant this petition to heal the breach between the circuits before this can happen. Fortunately, as discussed below, the Court need not reinvent the wheel to harmonize First Amendment jurisprudence – it needs only to enforce the principles applied in *Citizens United* and *Davis*.

III. The principles enforced by the Court in *Citizens United* and *Davis* provide a clear framework for harmonizing the split between the circuits on the constitutionality of matching funds triggers.

The Court can bring harmony to the circuits on the question of the constitutionality of matching funds triggers by enforcing *Citizens United* and

Davis. Matching funds triggers clearly run afoul of *Citizens United*'s requirement that campaign finance regulations prevent actual or apparent *quid pro quo corruption*, rather than leveling disproportionate resources and influence among candidates and interest groups. 130 S. Ct. at 909-11. Moreover, as discussed below, the Ninth Circuit's merits decision is an outlier that uniquely impedes lower courts from logically applying *Davis* to harmonize the split among the circuits on the constitutionality of matching funds. Therefore, while enforcing *Citizens United* and *Davis* can unify First Amendment jurisprudence on the constitutionality of matching funds triggers, the Court must first grant this petition.

A. *Citizens United*'s prohibition on influence and resource leveling campaign finance regulations provides a clear framework for harmonizing the split between the circuits.

Under *Citizens United*, the Supreme Court unequivocally declared that the purpose of diminishing or leveling the disproportionate resources and influence of certain factions cannot justify campaign finance regulation. 130 S. Ct. at 909-11. In direct opposition to *Citizens United*'s holding, the Arizona Citizens Clean Elections Act unequivocally aims at "diminishing the influence of special interest money," protecting "the voices and influence of the vast majority of American citizens," and encouraging qualified candidates to run for office "who lack personal wealth

or access to special-interest funding." ARIZ. REV. STAT. § 16-940. State agencies enforcing similar statutory schemes throughout the United States also freely admit the influence and resource leveling purpose of matching funds triggers. *See, e.g.*, Understanding Connecticut Campaign Finance Laws: A Guide for 2008 General Assembly Candidates Participating in the Citizens' Election Program, at 2 (2008), available at http://www.ct.gov/seec/lib/seec/publications/cep_guide_june_2008_final_auto.pdf (last visited August 12, 2010). The resource and influence leveling purpose of matching funds triggers is further evidenced by Respondents' admissions following this Court's June 8, 2010 order.

After the issuance of this Court's June 8, 2010 order blocking the issuance of matching funds, no member of the Arizona Citizens Clean Elections Commission articulated any concern about anticorruption purposes being frustrated by enjoining Arizona's matching funds trigger. Pet. App. 182-89. Instead, the Commissioners discussed how the decision was "unfair" to candidates because it prevented the Clean Elections Act from "leveling the playing field," which it was "designed to do." Pet. App. 186-87. Moreover, the drafter of the Clean Elections Act, Respondent Clean Elections Commissioner Louis Hoffman, admitted that Arizona's matching funds trigger was designed to give participating candidates access to *private contributions* in the event there were insufficient public funds to finance their campaigns. Pet. App. 183-84 (referring to ARIZ. REV. STAT. § 16-954(F)).

As the foregoing facts illustrate, matching funds triggers are plainly meant to equalize resources and influence among candidates and interest groups. In particular, when push comes to shove, Arizona's matching funds trigger is designed to elevate its resource and influence leveling purpose above any purported purpose associated with shielding participating candidates from the influence of private contributions. Accordingly, by enforcing *Citizens United*'s requirement that campaign finance regulations serve genuine anticorruption purposes, this court could immediately bring harmony to First Amendment jurisprudence.[1]

---

[1] Of course, the Ninth Circuit contends that the resource and influence leveling purpose of matching funds triggers encourages the participation of candidates in public financing schemes, which, in turn, purportedly prevents actual or apparent *quid pro quo* corruption. Pet. App. 34-38. But this claim essentially concedes that matching funds triggers amount to "prophylaxis-upon-prophylaxis," which cannot withstand strict scrutiny under *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007). Even if intermediate scrutiny were applicable to matching funds triggers, as held by the Ninth Circuit, encouraging participation in public financing schemes does not *ipso facto* serve anticorruption purposes as required by *Citizens United*. Expert witness Dr. Marcus Osborn and the Eleventh Circuit have both emphasized that promoting participation in public financing does not advance any anticorruption purpose when private campaign financing is already stringently regulated, such as in Arizona and Florida. *Compare* Pet. App. 255-74 *with Scott*, 2010 WL 2977614, at *13-*14, 2010 U.S. App. LEXIS 15897, at *37-*40.

B. *Davis* also provides a framework for harmonizing the split between the circuits by isolating the Ninth Circuit as an outlier.

Davis also provides a powerful framework for harmonizing the split between the circuits on the constitutionality of matching funds triggers. In *Davis*, the Court struck down the "Millionaire's Amendment" – a federal campaign finance regulation that triggered elevated contribution limits for one candidate when an opposing self-financed candidate contributed or spent his own money above a certain threshold. In striking down the Millionaire's Amendment, *Davis* directly relied upon *Day*, 34 F.3d 1356, 1359-60, which struck down Minnesota's matching funds trigger. *Davis*, 128 S. Ct. at 2772. *Davis*' reference to *Day* was not a random space-filling citation. The Court clearly regarded the fates of contribution limit triggers and matching funds triggers to be linked. *Davis*' acceptance of this premise holds the key to harmonizing First Amendment jurisprudence among the circuits.

1. By tying the fate of contribution limit triggers to matching funds triggers, *Davis* makes it possible to harmonize the First, Second, Fourth, Sixth, Eighth and Eleventh Circuits.

The First, Fourth and Sixth Circuit cases that upheld matching funds triggers prior to *Davis* were each premised on the *constitutionality* of contribution

limit triggers. This is evidenced by the fact that the Fourth Circuit case of *Leake*, 524 F.3d at 437, which upheld North Carolina's matching funds trigger, directly relied upon the First and Sixth Circuit cases of *Daggett* and *Gable* to reach its holding. *Daggett* and *Gable*, in turn, directly relied upon *Wilkinson v. Jones*, 876 F. Supp. 916, 927-28 (W.D. Ky. 1995), which upheld contribution limit triggers. *Daggett*, 205 F.3d at 469; *Gable*, 142 F.3d at 947 n.7.

By striking down contribution limit triggers, *Davis* necessarily overruled *Wilkinson*. Because *Davis* overrules the case upon which the First, Fourth and Sixth Circuits base their affirmation of matching funds triggers, a logical application of *Davis'* holding could naturally heal their split with the Second, Eighth and Eleventh Circuits. Simply put, by overruling *Wilkinson*, *Davis* implicitly overruled *Daggett* and *Gable* by undercutting their reliance upon *Wilkinson*. And by implicitly overruling *Daggett* and *Gable*, *Davis* also implicitly overruled the Fourth Circuit Case of *Leake*. *Davis* thus furnishes a powerful precedential framework for harmonizing First Amendment jurisprudence concerning matching funds triggers among the First, Second, Fourth, Sixth, Eighth, and Eleventh Circuits. Unfortunately, the Ninth Circuit has disrupted the harmonious development of the law under *Davis*.

2. This petition should be granted because the Ninth Circuit's decision is a unique impediment to the harmonious development of First Amendment jurisprudence under *Davis*.

The Ninth Circuit is an outlier even among circuits that have upheld matching funds triggers. Despite *Davis*' direct reliance upon *Day*, the Ninth Circuit is the only circuit that does not regard the fate of matching funds triggers to be tied to the fate of contribution limit triggers under the First Amendment. Pet. App. 27-32 & 28-30 n.9. In this respect, despite purporting to follow *Daggett*, the Ninth Circuit actually deviated from *Daggett*'s reasoning to reach *Daggett*'s outcome.

In pursuit of a preferred outcome, the Ninth Circuit has created a new split between the circuits as to whether contribution limit triggers and matching funds triggers impose the same kind of burden on free speech. By fomenting this new circuit split, the Ninth Circuit has disrupted the uniformity that otherwise could have naturally arisen from lower courts logically applying *Davis* to heal the split between and among the First, Second, Fourth, Sixth, Eighth and Eleventh Circuits. And because the Ninth Circuit is a unique impediment to the harmonious development of First Amendment jurisprudence concerning matching funds triggers under *Davis*, granting this petition *in particular* is absolutely essential to establishing uniformity in the law.

CONCLUSION

This case clearly involves matters of nationwide importance. If the circuit split over the constitutionality of matching funds triggers is not resolved, confusion will soon envelope First Amendment jurisprudence. To restore and ensure uniformity in the law, this Court should grant this petition. *Citizens United* and *Davis* lead the way.

Respectfully submitted,

CLINT BOLICK
NICHOLAS C. DRANIAS*
GUSTAVO E. SCHNEIDER
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
telephone: (602) 462-5000
facsimile: (602) 256-7045
ndranias@goldwaterinstitute.org

Counsel for Petitioners
**Counsel of Record*

United States Court of Appeals
for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 05/21/2010 at 10:26:28 AM PDT and filed on 05/21/2010

Case Name: John McComish, et al v. Ken Bennett, et al

Case Number: 10-15165

Document(s): Document(s)

Docket Text:

FILED OPINION (ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS) REVERSED AND REMANDED. Judge: AJK Concurring, Judge: AWT Authoring, Judge: . FILED AND ENTERED JUDGMENT. [7345699] [10-15165, 10-15166] (RP)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH; NANCY MCLAIN; TONY BOUIE,

Plaintiffs-Appellees,

ROBERT BURNS,

Plaintiff-Intervenor-Appellee,

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC; ARIZONA TAXPAYERS ACTION COMMITTEE, agent of Taxpayers Action Committee; DEAN MARTIN; RICK MURPHY,

Plaintiffs-Intervenors-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; GARY SCARAMAZZO; ROYANN J. PARKER; JEFFREY L. FAIRMAN; DONALD LINDHOLM; LORI S. DANIELS, in their official capacities as members of the Arizona Citizens Clean Elections Commission,

Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

No. 10-15165

D.C. No.
CV-08-1550-ROS

JOHN MCCOMISH; NANCY MCLAIN; TONY BOUIE,

Plaintiffs-Appellees,

DEAN MARTIN; ROBERT BURNS; RICK MURPHY; ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC; ARIZONA TAXPAYERS ACTION COMMITTEE, agent of Taxpayers Action Committee,

Plaintiffs-Intervenors-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; GARY SCARAMAZZO; ROYANN J. PARKER; JEFFREY L. FAIRMAN; DONALD LINDHOLM; LORI S. DANIELS, in their official capacities as members of the Arizona Citizens Clean Elections Commission,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor-Appellant.

No. 10-15166

D.C. No. CV 08-1550 ROS

ORDER AND AMENDED OPINION

Appeals from the United States District Court for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
April 12, 2010 – San Francisco, California

Filed May 21, 2010
Amended June 23, 2010

Before: Andrew J. Kleinfeld, A. Wallace Tashima, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Tashima;
Concurrence by Judge Kleinfeld

COUNSEL

Nicholas C. Dranias, Goldwater Institute, Phoeniz [sic], Arizona, for the plaintiffs-appellees.

William R. Maurer, Institute for Justice, Seattle, Washington, for the plaintiffs-intervenors-appellees.

Mary R. O'Gracy, Solicitor General of Arizona, Phoenix, Arizona, for the defendants-appellants.

Bradley S. Phillips, Munger, Tolles, & Olson, Los Angeles, California, for the defendant-intervenor-appellant.

Stephen M. Hoersting, Center for Competitive Politics, Alexandria, Virginia, for *amicus curiae* Center for Competitive Politics.

ORDER

The opinion filed May 21, 2010, slip op. 7319, is amended by deleting footnote 1, slip op. at 7326, and substituting the following footnote in its place:

> 1 Governor Symington was sentenced to a 30-month term of imprisonment, but his conviction was reversed and the case

remanded for a new trial. *See United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999). He was then granted a presidential pardon just as his retrial was set to commence.

OPINION

TASHIMA, Circuit Judge:

This is a challenge to the constitutionality of the "matching funds" provision of Arizona's Citizens Clean Elections Act, Ariz. Rev. Stat. § 16-952. The Act establishes a legal frame-work within which the State of Arizona may provide public financing to candidates for state political offices. A candidate who chooses to participate in the Act's voluntary public financing scheme relinquishes her or his right to raise private campaign contributions. Instead, she or he receives an initial grant of funds from the state to spend on her or his campaign. The challenged provision ensures that if the participating candidate has an opponent who is not participating in the public financing system and whose campaign expenditures or contributions exceed a threshold set by the Act, she or he receives additional matching funds from the State.

Six past and future candidates for Arizona political office who have, or plan to, run privately-financed campaigns, as well as two political action committees who fund such candidates, brought suit to enjoin the Act's matching funds provision, alleging that it violates their rights under the First

Amendment and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. These Plaintiffs claim that the matching funds provision severely burdens their exercise of protected political speech by punishing them for making, receiving, or spending campaign contributions. As nonparticipating candidates, if they exceed the Act's matching funds threshold, they will trigger the disbursement of matching funds to their opponents. They allege that their fear of triggering matching funds to their opponent causes them to curb their campaign fundraising or spending, thereby chilling their speech. They also claim that because the Act treats candidates differently based on whether or not they participate in the public financing scheme, it denies them the equal protection of the law.

The district court held that the matching funds provision of the Act violated the First Amendment. It did not reach Plaintiffs' equal protection claim. After determining that the matching funds provision of the Act could not be severed from the Act as a whole, the district court granted Plaintiffs' motion for summary judgment, issued a declaratory judgment that the Act violates the First Amendment, and enjoined its enforcement.

Applying Supreme Court precedent analyzing campaign finance laws under the First Amendment, *see Citizens United v. FEC*, 130 S.Ct. 876 (2010); *Davis v. FEC*, 128 S.Ct. 2759 (2008); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), we conclude that the matching funds provision of the Act imposes only a

minimal burden on First Amendment rights. It survives intermediate scrutiny because it bears a substantial relation to the State's important interest in reducing *quid pro quo* political corruption. Because the Act conforms to the requirements of the First Amendment and must be upheld, we reverse. We decline to address Plaintiffs' equal protection claim in the first instance; instead, we remand to the district court so that it may consider the issue.

I. Statutory Background

Prior to the passage of the Citizens Clean Elections Act (the "Act"), Arizona had already adopted campaign contribution limits. Ariz. Rev. Stat. § 16-905 (historical and statutory note). In 1986, the State's voters passed an initiative measure establishing individual contribution limits of $200 for legislative candidates and $500 for statewide candidates, per election. *See id.* Even with these campaign contribution limits in place, Arizona experienced a series of massive political corruption scandals.

In 1988, Governor Evan Mecham was indicted on multiple criminal charges, including perjury and fraud for allegedly hiding a campaign loan. He was later impeached on charges of misuse of public funds and obstruction of justice, and ousted from office. Next, the "Savings and Loan Scandal" led to a United States Senate Ethics Committee investigation of certain activities of both U.S. Senators from Arizona,

who had received contributions and favors from Arizona savings and loan tycoon Charles Keating.

Then, in 1991, AzScam erupted. A sting operation caught state legislators on videotape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. The video footage was generally seen as outrageous. For example, Representative Don Kenny was seen stuffing a $55,000 cash bribe into a gym bag after joking, "are you sure there are no hidden cameras up there?" AzScam resulted in the indictment of twenty-one individuals, including lobbyists, political activists, and seven state legislators. Two additional state legislators were named in a civil racketeering suit. In total, nearly ten percent of the Arizona Legislature at the time faced civil or criminal charges related to AzScam. Former Arizona Governor J. Fife Symington testified that the scandal was highly publicized around the state.

In the late nineties, Governor Symington himself was embroiled in scandal and indicted on twenty-three counts, including using the power of his office to extort concessions from a pension fund to which he owed $10 million. He became Arizona's second governor in a row to leave his office in disgrace when he resigned in 1997, after being convicted on seven counts of filing false financial statements.[1]

---

[1] Governor Symington was sentenced to a 30 month term of imprisonment, but his conviction was reversed and the case

(Continued on following page)

In the wake of these scandals, the voters of Arizona passed the Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 - 16-961, an initiative measure, in the 1998 statewide election. Ariz. Rev. Stat. § 16-940 (historical and statutory note). There is no evidence that the Act was intended solely to remedy Arizona's apparent susceptibility to political corruption. Plaintiffs, however, introduced ample evidence indicating that when the Act was adopted, voters were aware of, and concerned about, continuing and repeated political corruption in Arizona.

The voter information pamphlet for the 1998 election argued that the Act should be approved because it would free politicians "to represent the best interests of all the citizens, not just the large financial contributors who can trade their cash for political support." Ballot Propositions Publicity Pamphlet for the 1998 Arizona General Election, at *87, *available at* http://www.azsos.gov/election/1998/info/pubpamphlet/prop200.pdf. One justification for the Act was that it would change Arizona's "reputation [as] a state rife with corruption and the abuse of money in politics. . . . [and] restore confidence in our political system." *Id.* at *88. The pamphlet further noted that under the existing

---

remanded for a new trial. *See United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999). He was then granted a presidential pardon just as his retrial was set to commence.

election law regime, "[o]ur elected officials are going to jail and this cycle of abuse seems endless."[2] *Id.*

The Act's findings state that the State's previous election financing system, "[u]ndermine[d] public confidence in the integrity of public officials," because it "[a]llow[ed] Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction." Ariz. Rev. Stat. § 16-940. The Act's stated purpose is to "create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech." *Id.*

Plaintiffs argue that the Act was not aimed at reducing corruption, and that legislative reforms designed to prevent another AzScam had already been adopted at the time the Act was passed. Instead, Plaintiffs contend that the Act's true purposes were to level the political playing field and reduce campaign spending.[3] Voters are motivated by varied and

---

[2] One of the Act's original supporters testified that another one of its goals was to "promote freedom of speech because . . . [under the Act,] more candidates would have more opportunity to speak."

[3] We recently recognized in *Long Beach Area Chamber of Commerce v. City of Long Beach*, that in light of Supreme Court precedent, "'preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'" *Long Beach*, No. 07-55691, ___ F.3d ___, 2010 WL 1729710 at *7

(Continued on following page)

conflicting motivations. Generally, a diverse electorate cannot be said to share one true intent in adopting an initiative measure. More specifically, the extent to which Arizona's various corruption scandals led to the passage of the Act cannot be precisely determined. Based on the record before us, however,

---

(9th Cir. April 30, 2010) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)). In particular, we observed that the so-called "anti-distortion rationale," under which the government claims an "interest in combating 'the corrosive and distorting effects of immense aggregations of wealth,'" is not a legitimate basis for campaign finance restrictions after the Supreme Court partially overruled *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), in its *Citizens United* decision. *Id.* at *6 (quoting *Austin*, 494 U.S. at 660 and discussing *Citizens United*, 130 S. Ct. at 904, 912-13). Likewise, the "time protection rationale," under which the government claims an interest in "'protect[ing] candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters'" may not serve as the basis for restricting campaign finance activity. *Id.* at *7 (quoting *Randall v. Sorrell*, 548 U.S. 230, 243-45 (2006)).

We need not, however, address the potential legitimacy of arguments that the State has not raised before us in defense of the Act. Further, even if the State had raised these arguments, "[i]t is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification" for the matching funds provision. *Buckley*, 424 U.S. at 26. Because the Act is justified by the State's legitimate and non-illusory interest in reducing quid pro quo corruption, we need not consider the constitutional legitimacy of other potential rationales that might support it. *See id.* at 24-27.

we conclude that one of the principal purposes of the Act was to reduce *quid pro quo* corruption.

The Act created a system of public financing for political campaigns. A candidate who chooses not to participate in this system may raise unlimited funds from private donations, subject to contribution limits and disclosure requirements, which existed before the Act. If a candidate opts to participate in the public financing system, she or he agrees to forfeit her or his right to fund her or his campaign with private contributions. Instead, she or he must collect a required number of five-dollar "qualifying contributions" during a specified time period to demonstrate that she or he has the voter support to be a viable candidate. Ariz. Rev. Stat. § 16-946. The number of required qualifying contributions varies between two hundred and four thousand, depending on the office that the candidate is seeking. Ariz. Rev. Stat. § 16-950(D).

If the candidate qualifies for public financing, she or he will then receive a lump-sum grant for her or his primary campaign, which varies depending on whether she or he is running opposed or unopposed in a party primary, or whether she or he is an independent candidate. Ariz. Rev. Stat. § 16-951. If the participating candidate has a nonparticipating opponent in the primary who spends more than her or his initial grant, or whose expenditures, combined with the value of independent expenditures in

opposition to her or his candidacy or in support of her or his nonparticipating opponent,[4] exceed the amount of her or his initial grant, the participating candidate will receive "matching funds" in the amount of the combined spending of her or his nonparticipating opponent, plus the value of independent expenditures against her or him or in support of her or his nonparticipating opponent, reduced by six percent and reduced by the amount of "early contributions" raised by the nonparticipating opponent during the pre-primary fundraising period.[5] Ariz. Rev. Stat. § 16-952, 16-945.

If the participating candidate wins her or his primary and continues on to the general election, she or he receives a second initial lump-sum grant. Ariz.

---

[4] An independent expenditure is a campaign expenditure made by a third party that "expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate." Ariz. Rev. Stat. § 16-901(14).

[5] The matching funds that the participating candidate receives are reduced by six percent to take into account the fact that nonparticipating candidates incur expenses in order to raise money. The assumption under-lying this provision is that a nonparticipating candidate must spend six dollars (on postage, event costs, etc.) in order to raise one hundred dollars, while a participating candidate has no fundraising costs. Therefore, in order for both candidates to have the same net amount available to spend on non-fundraising campaign expenses, the matching funds that the participating candidate receives are reduced by six percent.

Rev. Stat. § 16-952. If she or he has a non-participating opponent in the primary whose contributions received, combined with the value of independent expenditures in supporting him or her and opposing the participating candidate, less his or her expenditures during the primary campaign, exceed the amount of the participating candidate's second initial grant, the participating candidate will receive matching funds, calculated in the same manner as in the primary campaign. Ariz. Rev. Stat. § 16-952(B). During both elections, matching funds, combined with the initial grant, may not exceed three times the amount of the initial grant. Ariz. Rev. Stat. § 16-952(E). This means that a nonparticipating candidate who is able to raise funds in excess of three times the amount of his or her participating candidate's initial grant gains a potentially unlimited financial advantage in the campaigns.

II. Factual Background

Plaintiffs are John McComish and Nancy McLain, current members of the Arizona House of Representatives who are seeking reelection in 2010, Tony Bouie, a non-incumbent candidate for the Arizona House of Representatives, and Robert Burns, an Arizona State Senator seeking reelection in 2010. Joining them in this challenge to the Act are plaintiffs-intervenors, Dean Martin, a former Arizona State Senator, current State Treasurer, and candidate for Governor in 2010, Rick Murphy a member of the Arizona House of Representatives seeking reelection

in 2010, the Arizona Free Enterprise Club's Freedom Club PAC ("Freedom Club PAC"), a political action committee ("PAC") which makes contributions to Arizonans for a Sound Economy, an independent expenditure committee that funds independent expenditures in races subject to the Act, and the Arizona Taxpayers Action Committee ("Arizona Taxpayers"), an independent expenditure committee that makes independent expenditures in races subject to the Act. All candidate-plaintiffs have declined to participate in the Act's public funding program and will be running in the 2010 election as privately-financed candidates.

Plaintiffs sued Jan Brewer, in her official capacity as Arizona Secretary of State,[6] and Gary Scaramazzo, Royann Parker, Jeffrey Fairman, Donald Lindholm, and Lori Daniels, in their official capacities as members of the Arizona Citizens Clean Elections Commission (collectively, the "State"). The Clean Elections Institute, Inc., a nonprofit organization formed to continue the work of Arizonans for Clean Elections, the campaign committee that sponsored the initiative that created the Act, intervened as a defendant.

Since 2002, between fifty-two percent and sixty-seven percent of candidates for state office during general elections have chosen to participate in the

---

[6] Ken Bennett has succeeded Jan Brewer as Secretary of State since the commencement of this action.

Act's public funding program. Plaintiffs contend that matching funds have dampened overall campaign spending in Arizona. It is undisputed, however, that overall campaign spending in Arizona has increased since the Act's passage.

Plaintiffs also allege that matching funds have specifically deterred them from engaging in political expression through monetary expenditures. They argue that the fear of triggering matching funds causes privately-funded candidates to refrain from or delay raising and spending money in support of their campaigns. They contend that matching funds burden the speech of independent expenditure committees by causing them to delay making independent expenditures in order to avoid triggering matching funds until later in the campaign, when the publicly-financed candidate will have less time to use them, in an attempt to minimize the competitive benefit of the matching funds to the publicly-financed candidate.

We agree with the district court's observation that "Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act." John McComish testified that in his 2008 campaign for the House of Representatives, he triggered matching funds to his opponents. In order to avoid triggering additional matching funds to his opponents until later in the campaign, he "deci[ded] to wait and not make any substantial expenditures until September 2, 2008." McComish describes this as an act of "self-censorship" in order to avoid the

consequence of "disseminat[ing] viewpoints hostile to my campaign."

Nancy McLain testified that during her 2008 campaign for House of Representatives she "made a conscious decision to not raise or spend a significant amount because it could not be spent without resulting in 'equalizing funds.'" Although she avoided triggering matching funds in the general election, she triggered matching funds in the primary. She claims that her "reluctance to fundraise and spend money during the primary election meant that [she] was not able to broadcast [her] message either on air or in newspapers as often as [she] thought necessary to win the election," although she was victorious. She describes matching funds as imposing a "competitive disadvantage" on her campaign, which her fundraising and spending choices "seek to minimize."

Tony Bouie also triggered matching funds during his 2008 campaign for House of Representatives. He testified that because he had "no control over independent expenditures that the Commission deems [to] benefit him" he "fe[lt] compelled to conserve money for damage-control in anticipation of poorly-conceived independent expenditures backfiring after they trigger matching funds" to his opponents. As a result he "change[d his] campaign strategy" by "holding [his] campaign speech until [his] expenditures could be timed to minimize the impact of the matching funds." He believes that matching funds thereby "placed [him] at a continuous tactical disadvantage."

Robert Burns "believe[s] that the existence of matching funds coerces traditionally funded candidates into changing their message and the timing of getting out their message, even if ultimately the amount of messaging a traditional candidate chooses to engage in does not change." His deposition testimony indicated that matching funds had not actually chilled his speech during his most recent 2008 election for State Senate. He admitted that he was willing to trigger matching funds. Further, he also indicated that despite the matching funds provision, he simply communicated his message to the extent he felt was necessary to win, stating "[i]f I had to spend X number of dollars to get out a – a mailer, and I had that amount of money, I would go ahead and do the mailer."

Dean Martin stated that "the matching funds provision of the Act forced [him] to self-censor" in his most recent race for State Treasurer in 2006. He reasoned that the "only way [he] could avoid being massively outspent by [his] opponent was to prevent the triggering of additional matching funds to her campaign" and "was thus coerced into accepting the same limits as [his] government-funded opponent . . . [without] receiv[ing] any of the benefits of being a government-funded candidate, such as the receipt of matching funds for independent expenditures that opposed [his] candidacy and the label 'participating' or 'clean' candidate." Despite Martin's testimony that he felt matching funds severely burdened his speech, he curiously could not even recall whether he had

ever triggered matching funds to an opponent. The record indicates that Martin is fundamentally opposed to the policy of publicly financing political campaigns, regardless of whether a given public financing scheme includes a provision for matching funds.

Rick Murphy ran successfully for House of Representatives as a participating candidate in 2004. He later ran for reelection in 2006 and 2008 as a nonparticipating candidate. He testified that he attempted to not trigger matching funds during his 2006 campaign because, since his opponent would receive additional matching funds once he surpassed the threshold amount, "[i]t didn't seem like it made a lot of sense for me to do that, so I curtailed my speech and curtailed my fundraising in order to prevent it." Still, Murphy testified that matching funds have never prevented him from accepting a political contribution. Murphy's testimony that he curtailed his fundraising for fear of triggering matching funds was directly contradicted by his own campaign consultant, who testified that he advised Murphy to "raise as much money" as he could from "everywhere," that he never advised Murphy to stop raising money, and that Murphy never curtailed or stopped his fundraising efforts.

The treasurer of the Freedom Club PAC testified that the PAC has never been prevented from making an independent expenditure for fear of triggering matching funds. He further stated that he takes into account various campaign finance "reporting

requirements, notifications and filings" upon which matching funds disbursement determinations by the Citizens Clean Elections Commission are based, in determining when to spend money.

Arizona Taxpayers stated that it "decided not to speak in opposition to [a] participating candidate . . . in the 2006 primary election because such speech would have triggered matching funds." However, the groups's founder admitted that it had never decided against making an expenditure because it would trigger matching funds. Further, the evidence demonstrates that Arizona Taxpayers could not afford to make expenditures during the 2006 primary election, because it had only $52.72 in cash on hand.

III. Standard and Scope of Review

We review the district court's grant of summary judgment to Plaintiffs and denial of summary judgment to the State de novo.[*] *See Block v. City of L.A.*, 253 F.3d 410, 416 (9th Cir. 2001). This means that we will look at the case "anew, the same as if it had not been heard before, and as if no decision previously had been rendered," and "giving no deference to the district judge's determinations." *Freeman v. DirecTV,*

---

[*] "Ordinarily a denial of a motion for summary judgment is not a final order and thus not appealable. 28 U.S.C. § 1291. However, the district court's grant of summary judgment was a final decision giving us jurisdiction to review its denial of [the State's] motion for summary judgment." *Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 n.20 (9th Cir. 1988).

Inc., 457 F.3d 1001, 1004 (9th Cir. 2006); *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007).* We apply the same legal standard that the district court did, "[v]iewing the evidence in the light most favorable to the nonmoving party," and granting summary judgment "only if no genuine issues of material fact remain for trial and the moving party is entitled to judgment as a matter of law." *Block*, 253 F.3d at 416. We "may affirm on any ground supported by the record." *N. Mariana Islands v. United States*, 399 F.3d 1057, 1060 (9th Cir. 2005). Because the district court did not rule on the parties' evidentiary objections and did not strike any evidence from the record, all of the evidence adduced below remains a part of the record before us on appeal. *See Vinson v. Thomas*, 288 F.3d 1145, 1152 & n.8 (9th Cir. 2002).

---

* We reject Plaintiffs' argument that *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003), requires us to review the district court's findings of fact for clear error because its opinion was one which struck down a restriction on speech. *Brown*, and the line of cases that it follows, apply to this Court's review of cases in which the district court made findings of fact in the process of issuing a preliminary injunction or holding a bench trial, or when questions of fact were submitted to a jury. *See Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1066-1070 (9th Cir. 2002) (en banc). This case, arising from a grant of summary judgment, is in an entirely different procedural posture to which these cases do not apply.

IV. Analysis

First, we must determine what level of constitutional scrutiny applies to the Act's matching funds provision. The level of scrutiny that applies to a law which implicates First Amendment concerns is "dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue." *Lincoln Club v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). We must, therefore, engage in a two-step inquiry. First, we determine whether the type of speech the law affects is fully protected by the First Amendment. Next, we determine the type of burden, if any, that the law places on that speech. Laws that place severe burdens on fully protected speech are subject to strict scrutiny. Laws that "place[ ] only a minimal burden on fully protected . . . freedoms" or that apply to "speech and associational freedoms [that] are not fully protected by the First Amendment" receive intermediate scrutiny. *Id.*

[1] *Buckley*, the Supreme Court's landmark case on the constitutionality of campaign finance laws under the First Amendment, provides guidance in determining whether the Act affects fully protected speech. *Buckley* held that campaign contributions are not fully protected political speech. 424 U.S. at 21-22; *see also Lincoln Club*, 292 F.3d at 938-39. The Supreme Court reasoned that a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . [T]he transformation

of contributions into political debate involves speech by someone other than the contributor." *Buckley*, 424 U.S. at 21. By contrast, campaign expenditures are fully protected speech because a "restriction on the amount of money a person can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19.

[2] Following *Buckley*, a law that has a hybrid effect on both contributions and expenditures is interpreted as though it affects fully protected speech. *See Lincoln Club*, 292 F.3d at 939. The matching funds provision of the Act affects both contributions and expenditures. During primary elections, the Act explicitly ties participating candidate's matching fund disbursements to nonparticipating candidates' expenditures. Ariz. Rev. Stat. § 16-952. During a general election, the Act bases matching fund calculations on contributions received by nonparticipating candidates. *Id.* This includes contributions that come from a nonparticipating candidate's personal funds, which, under *Buckley's* framework, are considered expenditures, and fully protected speech. *See* 424 U.S. at 51-55. Because the Act affects both contributions and expenditures, we analyze it as though it affects fully protected speech.

Next, we determine what level of burden, if any, the Act imposes on that speech. Plaintiffs argue that the Supreme Court's recent decision in *Davis*, 128 S. Ct. 2759, controls this case, and compels the

conclusion that the Act places a severe burden on their speech triggering the application of strict scrutiny. The State and Defendant-Intervenor counter that the Act places only a minimal or indirect burden on Plaintiffs' speech and that the Supreme Court's latest campaign finance decision, *Citizens United*, 130 S. Ct. 876, reaffirmed that intermediate scrutiny applies to such laws.

[3] In *Buckley*, the Supreme Court evaluated the constitutionality of provisions of the Federal Election Campaign Act of 1971, and related provisions of the Internal Revenue Code of 1954, as amended, which allowed for the public financing of presidential elections. *See* 424 U.S. at 6, 85-109. The Court found that the public financing scheme in that case was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus [it] furthers, not abridges, pertinent First Amendment values." *Id.* at 92-93 (footnote omitted). Therefore, the public financing of elections itself does not create any burden on speech.

In *Davis*, the Court struck down the Millionaire's Amendment to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441a-1(a). The Millionaire's Amendment applied to campaigns for the United States House of Representatives, in which all candidates are privately financed and there is no public funding. But if one candidate financed his campaign with personal funds in excess of a threshold

amount, "a new, asymmetrical regulatory scheme c[ame] into play." 128 S. Ct. at 2766. While the self-financing candidate continued to be subject to the normal contribution limits, his opponent, the 'non-self-financing' candidate became eligible to "receive individual contributions at treble the normal limit . . . even from individuals who may have reached the normal aggregate contributions cap, and [could] accept coordinated party expenditures without limit." *Id.* The *Davis* Court held that this "scheme of discriminatory contribution limits," "imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech." *Id.* at 2772. Having found the Millionaire's Amendment to be a substantial burden on fully protected speech, the Court applied strict scrutiny. *Id.*

Plaintiffs urge us to adopt the rationale of the district court and conclude that, under the logic of *Davis*, they have "established a cognizable burden" under the First Amendment. The district court reasoned that "[i]f the mere *potential* for your opponent to raise additional funds is a substantial burden, the granting of additional funds to your opponent must also be a burden." We disagree. As discussed below, we conclude that *Davis* is easily and properly distinguished from the case at bench.

The regulatory framework the Supreme Court examined in *Davis* is different from the one we confront under the Act. *Davis* says nothing about public "funding schemes and therefore says nothing about their constitutionality." Comment, 122 Harv. L.

Rev. 375, 383 (Nov. 2008). All of the candidates in *Davis* were subject to the same scheme regulating privately financed candidates. "Under the usual circumstances, the same restrictions apply to all the competitors for a seat and their authorized committees." *Davis*, 128 S.Ct. at 2765. But if one candidate heavily self-funded his campaign, it triggered an entirely new "asymmetrical regulatory scheme" that required him to file three additional types of campaign finance disclosures not required of his opponents. *Id.* at 2766-67. "Failure to comply with the reporting requirements may [have] result[ed] in civil and criminal penalties." *Id.* at 2767. It also triggered new, more generous campaign contribution limits, but only for the self-financing candidate's opponents. *Id.* at 2771.

In striking down the Millionaire's Amendment, the Supreme Court noted that had the law "simply raised the contribution limits for all candidates, Davis' argument would plainly fail." *Id.* at 2770; *see also id.* at 2771 ("Consequently, if § 319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits."). Instead, the law constituted a burden on Davis' speech only because it treated candidates running against each other under the same regulatory framework differently based on a candidate's decision to self-finance his or her campaign, which is a manner of engaging in fully protected speech. *Id.* at 2771.

In contrast, the Supreme Court has held that it is constitutional to subject candidates running against

each other for the same office to entirely different regulatory schemes when some candidates voluntarily choose to participate in a public financing system. *Buckley*, 424 U.S. at 97. "[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes." *Id.* "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Id.* at 97-98.

In *Davis*, the Millionaire's Amendment was an attempt to "level electoral opportunities for candidates of different personal wealth." 128 S. Ct. at 2773. This was problematic because *Buckley* had held that "the First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54. In *Citizens United*, the Supreme Court elaborated on its decision in *Davis*, indicating that the Millionaire's Amendment was unconstitutional because it specifically sought to disadvantage the rich. "The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Citizens United*, 130 S. Ct. at 905. Under the Act, while matching funds are calculated based on the total contributions received and expenditures made by a nonparticipating opponent, they are not distributed specifically to the opponents of wealthy candidates. Matching funds do not distinguish between

different sources of nonparticipating candidates' financing at all. The law in *Davis* was problematic because it singled out the speakers to whom it applied based on their identity. The Act's matching funds provision makes no such identity-based distinctions.

[4] Plaintiffs, perhaps recognizing that they have not demonstrated any actual chilling of their speech by the Act, argue that under *Davis*, we could strike down the matching funds provision without any proof that their speech has been deterred or punished. But *Davis* does not require this Court to recognize mere metaphysical threats to political speech as severe burdens. We will only conclude that the Act burdens speech to the extent that Plaintiffs have proven that the specter of matching funds has actually chilled or deterred them from accepting campaign contributions or making expenditures.

[5] Based on the record before us, we conclude that any burden the Act imposes on Plaintiffs' speech is indirect or minimal.[9] Since the Act's adoption,

---

[9] Prior to, and without the benefit of, the Supreme Court's recent decisions in *Citizens United* and *Davis*, three of our sister circuits considered the constitutionality of state public financing schemes with matching funds provisions similar to the one we now confront *See N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008); *Daggett v. Comm'n on Gov'tal Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). The Fourth and First Circuits concluded that the respective statutes imposed no First Amendment burden at all.

(Continued on following page)

See N.C. Right to Life, 524 F.3d at 437-49; *Daggett*, 205 F.3d at 464-65. The Eighth Circuit, however, concluded that the Minnesota law at issue imposed a substantial burden on fully protected political speech and, because it could not survive strict scrutiny, struck it down. *See Day*, 34 F.3d at 1360, 1363.

Plaintiffs argue that because the Supreme Court's decision in *Davis* cites *Day*, *Davis* somehow transformed the decision of one of our sister circuits into controlling precedent. *Davis* cites *Day* only once for a single, limited proposition. *See Davis*, 128 S. Ct. at 2772 ("Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite [the Millionaire's Amendment], but they must shoulder a special and potentially significant burden if they make that choice. *See Day v. Holahan*, 34 F.3d 1536, 1359-60 (C.A.8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures)"). In so citing *Day*, *Davis* did not affirm or adopt the Eighth Circuit's approach, nor did it overturn *sub silento* the decisions of the First and Fourth Circuits. It merely cited *Day* for what it is – a decision in which our sister circuit found that a law chilled protected speech and held that such a burden could not survive strict scrutiny. Our decision is not controlled by *Day*, nor are we persuaded by it.

In *Day*, plaintiffs demonstrated that the Minnesota statute they were challenging had a "chilling effect" on political speech and that its "mere enactment . . . ha[d] prevented many if not most potential political expenditures from ever being made." 34 F.3d at 1360. As discussed *infra*, Plaintiffs have not established the existence of such a chilling effect in the instant case. Having found that the Minnesota law imposed a substantial burden on fully protected political speech, the Eighth Circuit proceeded to apply strict scrutiny. *Id.* at 1361. The court concluded that the law could not survive that test because it found that the state's professed interest supporting the law, that of encouraging participation in the public financing program, was "not legitimate," "no matter how compelling in the abstract," because it was not

(Continued on following page)

campaign spending in Arizona has increased. Several Plaintiffs testified that they would have made increased expenditures or undertaken increased fundraising but for the matching funds provision. No Plaintiff, however, has pointed to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds. The record as a whole contradicts many of Plaintiffs' unsupported assertions that their speech has been chilled. Robert Burns admitted he was willing to trigger matching funds and spent as much money as he needed to in order to communicate his message. Dean Martin claimed his speech was chilled by matching funds, but could not even recall whether he had triggered them in the past. Rick Murphy admitted he had never turned a

---

based in fact, but was rather "contrived for purposes of [] litigation." *Id.* The record there demonstrated that the challenged provision was "not necessary to encourage candidates' involvement in public campaign financing, as participation was approaching 100% before the new campaign finance laws were passed." *Id.*

Two years after it decided *Day,* the Eighth Circuit, recognizing the unusual factual background of that case, declined to extend its reasoning and upheld other provisions of Minnesota's campaign finance law under strict scrutiny. *See Rosenstiel v. Rodriguez,* 101 F.3d 1544, 1555 (8th Cir. 1996). In the case at bench, because the interest Arizona asserts in support of the Act is not "contrived for purposes of this litigation," *Day,* 34 F.3d at 1361, even under current Eighth Circuit law "the circumstances surrounding the enactment of the [Act] make *Day* inapposite." *Rosenstiel,* 101 F.3d at 1555. We decline to follow the Eighth Circuit down a road that even it refused to follow.

contribution away, and his political consultant testified that he never slowed his fundraising. The Freedom Club PAC's treasurer testified that he has never been dissuaded from making an independent expenditure by the possibility of triggering matching funds. Arizona Taxpayers's claim that it declined to speak in the 2006 primary for fear of triggering matching funds seems disingenuous in light of the fact that it only had $52.72 cash on hand. Plaintiffs have not demonstrated that any chilling effect exists. Their own experiences campaigning under the Act highlight that it "in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Daggett*, 205 F.3d at 464.

Plaintiffs bemoan that matching funds deny them a competitive advantage in elections. The essence of this claim is not that they have been silenced, but that the speech of their opponents has been enabled. We agree with the First Circuit that the First Amendment includes "no right to speak free from response the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* (internal quotations omitted).

Plaintiffs' assertions that they have delayed making certain expenditures in order to avoid triggering matching funds to their opponents until later in the campaign cycle is evidence that they continue to seek strategic advantages under the Act, but does

not support the argument that their speech has been chilled. Many campaign finance regulations, particularly disclosure requirements, lead candidates to engage in such strategic behavior, but this does not make them unconstitutional. As the Court has observed, "the public begins to concentrate on elections only in the weeks immediately before they are held." *Citizens United*, 130 S. Ct. at 895. Consequently, waiting until that time to make campaign expenditures would not necessarily be evidence of coerced behavior. Rather, such decisions likely reflect a rational strategy of maximizing the impact of one's campaign funds.

[6] Although Plaintiffs cannot point to any specific instances in which their speech has been chilled because of the Act, we recognize that under the Supreme Court's jurisprudence, even laws that create only potential chilling effects impose some First Amendment burden. For example, the Supreme Court has held that campaign contribution disclosure requirements and campaign advertisement funding disclosure and disclaimer requirements impose a minimal burden on speech and are therefore subject to intermediate scrutiny. *See Buckley*, 424 U.S. at 64 (disclosure requirements); *Citizens United*, 130 S. Ct. at 914 (disclosure and disclaimer requirements). In *Buckley*, the law at issue required candidates and PACs, as well as some other individuals or groups making political contributions or expenditures, to file disclosure reports with the FEC. 424 U.S. at 63. The Court recognized that these reporting requirements

"can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. The Court also realized that the public disclosure of political contributions "will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation." *Id.* at 68. Even though these were "not insignificant burdens on individual rights," the Court analyzed them under intermediate scrutiny rather than strict scrutiny because the disclosure laws "impose no ceiling on campaign-related activities." *Id.* at 64, 68.

Recently, in *Citizens United*, the Court applied the same type of analysis to the BCRA's requirement that political advertisements must state who "is responsible for the content of [certain] advertising." 130 S. Ct. at 913-14. The Court reaffirmed *Buckley's* reasoning that such requirements may impose a cognizable burden under the First Amendment even though they "do not prevent anyone from speaking." *Id.* at 914.

The Court rejected the plaintiffs' arguments that the requirement "decreases both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer." *Id.* at 915. Notably, in the absence of any evidence "of harassment or retaliation," the Court also dismissed the plaintiffs' arguments that the disclosure requirements would "chill donations to an organization." *Id.* at 916.

[7] In this case, as in *Buckley* and *Citizens United*, the burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds. The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign expenditures. Also, as in *Buckley* and *Citizens United*, there is no evidence that any Plaintiff has actually suffered the consequence they allege the Act imposes. We conclude that the burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*. Following the Supreme Court's precedents in those cases, because the Act imposes only a minimal burden on fully protected speech, intermediate scrutiny applies.

[8] Examining the matching funds provision under intermediate scrutiny, because there is a "'substantial relation'" between the Act's matching funds provision and a "'sufficiently important' governmental interest," we conclude that it does not violate the First Amendment. *See Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*). The State has a sufficiently important interest in preventing corruption and the appearance of corruption. *See Citizens United*, 130 S. Ct. at 909. The record demonstrates that Arizona has a long history of *quid pro quo* corruption. AzScam, in which legislators literally sold their votes for cash bribes, was just one of many substantial,

wide-spread, and highly-publicized political scandals that Arizona experienced in the late 1980s and 1990s. These incidents occurred despite the contributions limits in place prior to the Act. Regardless of whether *quid pro quo* corruption continued to be a problem at the time of the Act's passage, the appearance of *quid pro quo* corruption to the electorate was undeniable. Arizona voters were justified in concluding that contribution limits alone were not sufficient to combat corruption and its appearance. As the Supreme Court has recognized, the State's interest in eradicating the appearance of *quid pro quo* corruption to restore the electorate's confidence in its system of government is not "illusory," it is substantial and compelling. *See Buckley*, 424 U.S. at 26-27.

Furthermore, the State has an interest in providing matching funds to encourage participation in its public funding scheme. Because *Buckley* held that public financing of elections furthers First Amendment values, federal courts have found that states may structure them in a manner which will encourage candidate participation in them. *See, e.g., Rosenstiel*, 101 F.3d at 1553 ("the State has a compelling interest in stimulating candidate participation in its public financing scheme"). The Eighth and First Circuits have found this interest to be so compelling as to withstand even the strictest scrutiny.[10] *See id.*;

---

[10] Because we hold that the Act is subject only to intermediate scrutiny, we need not decide whether the Act would survive strict scrutiny, as the First and Fourth Circuits have held with respect to public financing schemes similar to the Act

Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39-40 (1st Cir. 1993) (finding that the state has a "compelling" interest in "having candidates accept public financing").

The district court misapprehended how the Act functions to reduce corruption. It assumed that the Act works by reducing nonparticipating candidates' incentive to fundraise private contributions, thereby reducing the appearance of corruption among nonparticipating candidates. Thus, it concluded that the Act did not further an anticorrpution interest by providing matching funds to participating candidates triggered by non-participating candidates making contributions to their own campaigns from their own private funds. In doing so, it relied on the Court's holding that "discouraging use of personal funds[ ] disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773.

The fact is, however, that the Act is aimed at reducing corruption among participating candidates. The relevant inquiry thus is whether matching funds bear a substantial relation to reducing corruption among participating candidates. In exchange for public funding, participating candidates relinquish their right to raise campaign contributions from private donors. They therefore have both reduced opportunities and reduced incentives to trade legislative favors for financial favors. The Supreme Court has held "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of

large private contributions furthers a significant governmental interest." *Buckley*, 424 U.S. at 96.

Viewing the Act from this perspective, it is clear that the Act's anticorruption interest is further promoted by high participation in the program. The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption, because fewer of those elected officials will have accepted a private campaign contribution and thus be viewed as beholden to their campaign contributors or as susceptible to such influence.

It is not relevant under this analysis what the source of a nonparticipating candidate's campaign contributions is when he or she triggers matching funds. In order to promote participation in the program, and reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns, *no matter what the source of their opponent's funding*. If matching funds were not triggered by independent expenditures or expenditures from a nonparticipating candidate's own funds, the Act's public funding plan would not attract participants. It would be an enormous political risk to participate in such a system.

In this way, matching funds bear a substantial relation to the State's anticorruption interest. A public financing system with no participants does nothing to reduce the existence or appearance of *quid*

pro quo corruption. If participants were not given matching funds, they would not join the program because they would not be viable candidates in their elections. If the State were to adopt the district court's recommendation of structuring matching funds by tying them "solely to contributions made by third parties to a candidate," it would have the effect of deterring the participation of any candidate who feared she or he might have an opponent who was able to self-finance or would be the beneficiary of large independent expenditures. This would substantially diminish the Act's ability to attract participants, thereby undermining its ability to prevent corruption.

[9] In contrast, if the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom. By linking the amount of public funding in individual races to the amount of money being spent in these races, the State is able to allocate its funding among races of varying levels of competitiveness without having to make qualitative evaluations of which candidates are more "deserving" of funding beyond the base amounts provided to all publically-funded candidates. The State must walk a fine line between providing too much and too little funding to participating candidates, and we cannot conclude that the Act's matching funds provision has failed in this effort.

V. Conclusion

[10] For the reasons set forth above, we conclude that the matching funds provision of the Act does not violate the First Amendment. We decline to reach the equal protection claim, and reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

KLEINFELD, Circuit Judge, concurring:

I concur. My reasoning is slightly different. In my view, the historical and policy considerations do not matter to the outcome. Although the complaint asserts both a facial and an as applied challenge, the district court injunction and the arguments amount to a facial rejection of the statute.

The fact that matters is that the Arizona public financing scheme imposes no limitations whatsoever on a candidate's speech. *Davis v. Federal Election Commission*[1] is easily distinguished because there the scheme did indeed impose a limit on the candidate's speech, at least indirectly. If the candidate spent too much of his own money promoting his political position, then his opponent would benefit from a tripled contribution limit per donor.[2] The Arizona scheme does not manipulate the limits on private

---

[1] 128 S.Ct. 2759 (2008)

[2] *Id.* at 2766.

donors' contributions according to whether a competing candidate is participating in the government funding scheme. Had it done so, *Davis* would apply by analogy.

Other circuits have divided on whether schemes like Arizona's violate the First Amendment.[3] The Supreme Court cited with apparent approval the Eighth Circuit decision,[4] which may be contrary to the view we take today. But as the majority correctly says, it is not clear that the Supreme Court meant to adopt the Eighth Circuit view, and *Davis* did not require the Court to address a scheme like the one addressed by the Eighth Circuit.

I doubt that the level of scrutiny or risk of corruption matter in this case. The Arizona public financing scheme's matching funds provision imposes no limit at all on contributions or expenditures for one's own campaign. The limits are separate from the

---

[3] *Compare N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008) (holding that matching funds to publicly funded candidates that trigger based on contributions and expenditures for privately funded candidates do not impose any burden on First Amendment rights) *and Daggett v. Comm'n on Gov'tal Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (same) *with Day v. Holahan*, 34 F.3d 1356, 1360-62 (8th Cir. 1994) (holding that providing additional public funds in response to independent expenditures advocating for a privately financed candidate burdens the speech of the independent advocacy groups, subjecting the law to strict scrutiny, and striking it down).

[4] *Davis*, 128 S.Ct. at 2772.

public financing scheme and not challenged. The plaintiffs do not challenge the contribution limits.[5] Contribution limits are what invoke corruption and level of scrutiny considerations.

Plaintiffs challenge not contribution limits, but the benefits that the public financing scheme gives to participating candidates running against privately financed candidates and the strategic concerns the scheme creates for privately financed candidates. Because the challenged scheme imposes no contribution or spending limits, it does not restrict speech at all, so I cannot see why heightened scrutiny would apply.[6] All that the evidence shows is that candidates who forego public funding make strategic decisions in response to the public funding scheme.[7] That is not a restriction on speech. Intelligent, ambitious people seeking political office, or any other goal, are likely to study the rules and develop strategies taking

---

[5] Contribution limits are imposed by Arizona Revised Statutes § 16-905. Part of the referendum that created Arizona's public funding scheme alters the contribution limits by providing new rules for participating candidates, § 16-941(A), and uniformly decreasing the contribution limits for non-participating candidates, § 16-941(B) The complaint does not allege that either § 16-905 or § 16-941 is unconstitutional. It alleges that § 16-952, the matching funds provision of the referendum, is unconstitutional. Section 16-952 does not impose contribution limits.

[6] *Accord N.C. Right to Life*, 524 F.3d at 437; *Daggett*, 205 F.3d at 464.

[7] *N.C. Right to Life*, 524 F.3d at 438; *Daggett*, 205 F.3d at 464.

maximum advantage of the rules. The kinds of strategic choices generated by the Arizona rules do not differ in kind from the choices presented to candidates by other election laws. For example, candidates will run their campaigns differently according to whether there is a fixed election day or an extended period for mail-in ballots, at large elections of multiple candidates in one district or single winner elections in multiple smaller districts, or partisan or nonpartisan elections. That different laws generate different strategies does not make them restrictions on speech.

The only speech-related concern I can see to the Arizona scheme is that a privately funded candidate has to raise a lot more money to swamp a publicly funded candidate. Someone not serious about politics, but serious about traveling, eating meals, and seeing his picture on billboards and in the newspapers for months, all at taxpayer expense, might pose a genuine challenge to a privately funded candidate, unless that candidate could raise funds well beyond the ceiling in the public funding scheme. If the notion is that campaign contributions amount to disguised bribery, I suppose this might mean the Arizona scheme would promote rather than inhibit corruption. But it is hard to see the materiality of that because contribution limits have not been challenged, and all the corruption theory has been used to justify in First Amendment law is contribution limits. As for the privately funded candidate, his or her speech is not limited by this increased burden of fundraising.

Rather, his chances of winning are inhibited if he makes an incorrect judgment about whether he is going to be able to raise enough money to swamp the publicly funded candidate. But the First Amendment does not protect the candidate's interest in winning, just his interest in being heard. There is no First Amendment right to make one's opponent speak less,[8] nor is there a First Amendment right to prohibit the government from subsidizing one's opponent,[9] especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent.[10]

As for the practical effects of the Arizona scheme, I have no idea whether they are good or bad, and nothing in the record throws any light on whether the good outweighs the bad or vice versa. Intent and motivation do not show effect, because the unintended effects of reform frequently outweigh the intended effects. Nor does it matter whether the scheme is a good or bad one, for First Amendment purposes. Arizona is entitled to make good or bad

---

[8] *See Daggett*, 205 F.3d at 464.

[9] *Cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (holding that the National Endowment for the Arts may decide who to subsidize based on aesthetic value of artworks because a subsidy is not a regulation on who can speak).

[10] *Cf. Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (holding that a public university must make its printing facilities available to all qualifying student publications regardless of viewpoint).

laws so long as they do not violate the Constitution. Since this law does not limit speech, it does not violate the First Amendment.

Perhaps public funding is good because it helps candidates run for office without relying on contributions from people who will want something in return. Perhaps it is bad because in a state with a large electorate and mass media, large contributors are the only people involved who know a candidate, and their money gives the public the benefit of what amounts to quality screening by people who actually know the candidate. As for the notion that contributions amount to bribery, at least when they are large, that may be so, or it may be that large contributions amount to protection money that those especially vulnerable to government power pay to those they fear will wield it. Perhaps both, or neither, is true. Doubtless many contributions result from contributors' beliefs about who will provide good government, and gratitude to those willing to accept elected office and competent to discharge it well. None of this matters to this case. The only significance of the corruption concern to First Amendment law is that in *Buckley v. Valeo,* the concern was used to justify a limit on contributions to campaigns.[11] Since the case before us does not involve a contribution limit or any other burden on speech, the concern is immaterial.

---

[11] 424 U.S. 1, 25-26 (1976) (per curiam), *see also Citizens United v. Fed. Election Comm'n,* 130 S.Ct. 876, 901 (2010).

In sum, the Arizona public financing scheme does not limit speech directly or indirectly. The only Supreme Court case touching at all closely upon the issues is *Davis*, and *Davis* has to be distinguished because the scheme in that case affected contribution limits and this scheme does not. No Ninth Circuit case speaks to the constitutionality of the Arizona scheme or anything like it. Our sister circuits are divided. Accordingly, I conclude that Arizona is not constitutionally barred from using the scheme before us.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John McComish, et al., Plaintiffs, v. Jan Brewer, et al., Defendants.	**JUDGMENT IN A CIVIL CASE** CV 08-1550 PHX-ROS

Pursuant to the Court's order filed on January 20, 2010 and upon the Court's instruction therein, judgment is entered for the Plaintiffs and against Defendants.

JUDGMENT ENTERED this 21st day of January, 2010.

RICHARD H. WEARE
District Court Executive/Clerk

/s/ Linda S Patton
By: Deputy Clerk

cc: (all counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John McComish, et al., Plaintiffs, vs. Jan Brewer, et al., Defendants.	No. CV-08-1550-PHX-ROS **ORDER**

This case involves claims by Plaintiffs that the campaign finance regime adopted by the State of Arizona violates their free speech and equal protection rights. In short, Plaintiffs believe the campaign finance regime violates their rights because the state provides additional funds to publicly-funded candidates in the event non-publicly-funded candidates exceed certain campaign expenditure and fundraising limits. As set forth below, the regime burdens Plaintiffs' First Amendment rights, is not supported by a compelling state interest, is not narrowly tailored, and is not the least restrictive alternative.

The four cross motions for summary judgment were filed in June 2009. The parties filed responses and replies in July 2009. Beginning in late July, and continuing through September 2009, the parties made various filings regarding supplementing the record and submission of supplemental authority. In October the Court directed additional briefing on crucial issues not addressed in the parties' original

submissions. The additional briefing was not complete until mid-November. In December 2009 the parties continued to submit additional filings, and in January 2010 Plaintiffs filed a second motion for preliminary injunction. The Court ordered expedited briefing on that motion as well as supplemental briefing on the appropriate scope of available remedies.

The record in this case is unusually large and complicated. The summary judgment briefing consists of more than one hundred separate docket entries, many of which consist of multiple documents and hundreds of pages. Given the complicated nature of this case, the Court deemed it prudent to review in great detail the parties' submissions before issuing its ruling. This ruling is issued less than two months after the parties submitted the supplemental briefing.[1]

BACKGROUND

1. Passage of Clean Elections Act

The November 1998 election contained the initiative measure known as the Citizens Clean Elections Act ("Act").[2] According to the findings and declarations

---

[1] The District Court hearing the *Davis* matter took approximately ten months to issue its opinion, and it took the Supreme Court just under one year to issue its opinion.

[2] Defendants' briefing recounts various episodes of corruption in Arizona's state government allegedly leading up to

(Continued on following page)

contained in that initiative, the intent of the Act was "to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech." The proponents of the Act believed the election-financing system in effect at that time suffered from the eight flaws that follow:

1. Allowed "elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction";

2. Gave "incumbents an unhealthy advantage over challengers";

3. Hindered "communication to voters by many qualified candidates";

4. Suppressed "the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests";

5. Undermined "public confidence in the integrity of public officials";

6. Cost "average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors";

---

passage of the Act. Plaintiffs concede the episodes occurred, but disagree that they were the driving force for passage of the Act. From the record presented in the context of what constitutes admissible evidence, it is impossible to determine the extent to which the various corruption scandals led to passage of the Act.

7. Drove "up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding"; and

8. Required "elected officials spend too much of their time raising funds rather than representing the public."[1]

The voter information pamphlet contained various arguments "for" and "against" passage of the Act. According to the arguments in favor of the Act, "it's money that talks in political campaigns and it threatens the principles of our democracy." Also, "[a] thriving system depends upon solid governance and policies that benefit all of Arizonans, not just a few who can afford to 'pay to play.'" And "[p]olls reveal that a lack of confidence in government is a major factor" why individuals choose not to vote. Voting in favor of the Act would "end the money chase, halt corruption, limit campaign spending and reduce special interest influence." Voting in favor of the Act would also "make sure that no lobbyist or special interest can again 'buy' a candidate as they are doing now."

The arguments against the Act in the voter information pamphlet claimed it would levy "a host of new taxes, create[ ] a new level of bureaucracy,

---

[1] This information is taken from the Ballot Propositions Publicity Pamphlet for the 1998 General Election. Available at http://www.azsos.gov/election/1998/Info/PubPamphlet/Cover.html

provide[ ] taxpayer funds for fringe candidates, punish[ ] candidates who don't want to use taxpayer funds, and limit[ ] free speech." The opponents believed tax dollars should be saved "for education and the safety of [their] children" instead of wasted on "wacky candidates." The Act passed with approximately 51% of the vote.

2. Operation of Act

The Act, as currently constituted, provides a voluntary system of campaign financing in which all candidates for public office must decide whether to be a "participating candidate" or a "non-participating candidate." Participating candidates must collect a certain number of five-dollar "qualifying contributions." Once a participating candidate collects the minimum number of "qualifying contributions," he or she receives an initial grant for the primary. During the primary campaign, the participating candidate will receive additional funds in the form of "matching funds" if the participating candidate has a non-participating opponent that spends more than the initial grant.[4] The participating candidate will also

---

[4] "Matching funds" are a dollar-for-dollar match minus 6% meant to compensate for the fundraising expenses incurred by traditional candidates. A.R.S. § 16-952(A). The parties use the terms "matching contributions" and "matching funds" interchangeably. This opinion will use matching funds.

receive matching contributions if there are "independent expenditures"[5] against the participating candidate or in favor of the non-participating opponent. Participating candidates cannot raise or spend money in addition to the grant.

In the general election, a participating candidate receives a second initial grant. Matching funds are awarded if the non-participating candidate's receipts (i.e. contributions), less expenditures made during the primary campaign, exceed the second initial grant. Independent expenditures trigger matching funds in the general campaign the same way they triggered matching funds in the primary campaign. Matching funds cap out at three times the applicable spending limit. Independent expenditures by Political Action Committees[6] ("PACs") made on behalf of a candidate – non-participating or participating – or in opposition to the participating opponent also count towards the spending limit.

Based on this structure, a candidate is faced with the initial choice of whether to participate in public

---

[5] "Independent expenditures" are defined as "expenditures by a person or political committee, other than a candidate's campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate." A.R.S. § 16-901(14).

[6] Political Action Committees are groups organized "for the purpose of influencing the result of any election." A.R.S. 16-901.

funding. If the candidate decides not to participate in public funding, he or she must determine how much money to spend on the race and how much time to engaged [sic] in seeking fundraising. Assuming the candidate has a publicly funded opponent, the candidate's expenditures and fundraising may result in additional funds granted to that opponent. Those additional funds, however, are limited. Once a non-participating candidate has raised or spent more than three times the initial grant, no additional matching funds will be given to the participating opponent. Simply, there are no consequences once a non-participating candidate has raised or spent more than three times the initial grant.

3. Participation in and Consequences of Act

The Act has been in place for the past five elections.[*] Since 2002, candidate participation has varied between 52% and 67%. (Doc. 293 at 3). The parties disagree on whether the Act has had an impact on total campaign spending. It is undisputed that campaign spending has increased since the Act's passage, but it is unclear whether that increase can be traced to the Act. The parties also disagree on whether candidates' spending patterns show the Act has any effect on candidate behavior. Defendants assert the spending patterns of candidates prove the Act has no chilling effect. According to Defendants, if

---

[*] The Act applies to elections for statewide offices.

the Act truly is chilling speech, one would expect to find candidates spend just up to but no more than the spending limit. In other words, candidates would attempt to spend the maximum amount they are able to spend without triggering matching funds. Aggregate statistics show candidates do not do so. But this evidence does not dispose of Plaintiffs' claims that their speech was chilled and will be chilled. For example, some of the Plaintiffs triggered matching funds. Those individuals now claim they would have spent more or spent at a different time if matching funds were not a possibility.[5] Accordingly, the evidence regarding candidate spending does not definitively establish a chilling effect, or lack thereof.

4. Plaintiffs' Statements Regarding Burden of Act

Plaintiffs and Plaintiff-Intervenors are incumbents, past or future candidates for office, and Political Action Committees ("PACs"). Plaintiffs were asked during discovery to explain how the Act burdens their rights. Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act. Evidence regarding each Plaintiff is recounted below.

---

[5] Other Plaintiffs did not spend enough to trigger matching funds, and it does not appear that they stopped spending just short of the point where matching funds would be awarded.

a. John McComish

Plaintiff John McComish is a member of the Arizona State House of Representatives who plans on running for reelection in 2010. In 2008, Mr. McComish ran as a non-participating candidate. (Doc. 316). In the 2008 election, Mr. McComish had at least three participating opponents. Those opponents received matching funds based on Mr. McComish's expenditures as well as expenditures by third parties. Mr. McComish claims the Act requires him to take steps to minimize the impact of matching funds. Mr. McComish does this "by refraining from making campaign expenditures that [he] would otherwise make . . . or by adopting a tactic of delaying [his] expenditures in such a manner as to minimize the benefit any participating candidate may receive from matching funds." This, according to Mr. McComish, "amounts to self-censorship because [he] will refrain from engaging in communication at times and in manners that [he] would otherwise choose in order to avoid disseminating viewpoints that are hostile to [his] candidacy." (*Id.* at 5).

Mr. McComish also believes matching funds "discriminate against traditional candidates." (Doc. 316 at 5). This "discrimination" allegedly occurs when a non-participating candidate triggers matching funds to his opponents. The Court is unable to conceive of how an award of matching funds "discriminates" against McComish. Discrimination in a general sense requires that two individuals or groups be treated differently by the government. Mr. McComish and the

other Plaintiffs mentioned below have not explained how they have been legally disfavored by the government in comparison to participating candidates.

b. Nancy McLain

Plaintiff Nancy McLain is a member of the Arizona House of Representatives and plans on running for reelection in 2010. During the 2008 primary election, Ms. McLain triggered the award of matching funds to an opponent. (Doc. 317 at 4). Independent expenditures, allegedly aiding Ms. McLain, triggered additional matching funds. During the most recent general election, Ms. McLain had two participating opponents. The presence of these opponents made her "reluctant to fundraise . . . or personally contribute or loan money to [her] campaign." Ms. McLain did not trigger matching funds for the general election. In the future, Ms. McLain plans on minimizing her fundraising and spending, or altering the mode of her fundraising and spending, to lessen the impact of any matching funds. Thus, matching funds allegedly require that Ms. McLain engage in "self-censorship."

Like Mr. McComish, Ms. McLain claims matching funds constitute a "discriminatory legal framework." Again, it is unclear what type of discrimination Ms. McLain believes is at issue.

c. Tony Bouie

Tony Bouie is a non-participating candidate for the Arizona House of Representatives. During the 2008 primary campaign, Mr. Bouie had participating and non-participating opponents. Mr. Bouie and his non-participating opponent both exceeded the spending limit during the primary campaign. Thus, the participating opponent received matching funds. Mr. Bouie claims his "speech was chilled from the moment [he] understood the general idea of matching funds." (Doc. 318). Mr. Bouie ceased "the promotion of [his] campaign and [held his] campaign speech until [his] expenditures could be timed[9] to minimize the impact of matching funds provisions." The Act caused Mr. Bouie to "self-censor until the last days of the election rather than sending out mailers, making auto calls, and passing out information door-to-door."

d. Dean Martin

Dean Martin is the current Arizona State Treasurer and was elected to the State Senate in 2000, 2002, and 2004. (Doc. 288-2 at 4). In each of his campaigns, Mr. Martin ran as a non-participating candidate. Mr. Martin claims during his most recent campaign he "was forced to limit [his] speech and abide by the Act's expenditure limits or risk being

---

[9] Delaying expenditures as much as possible minimizes the impact of matching funds because the participating opponent will not have time to spend the matching funds.

further outspent by [his] government-funded opponent because of the operation of the Act." (Doc. 288-6 at 113). Mr. Martin states "[t]he only way [he] could avoid being massively outspent by [his] opponent was to prevent the triggering of additional matching funds to [his opponent's] campaign." (*Id.* at 114). Thus, Mr. Martin "stopped accepting contributions to [his] campaign." (*Id.*). Mr. Martin triggered a relatively small amount of matching funds in the 2006 State Treasurer race. (Doc. 362-1 at 22).

Despite Mr. Martin's statement that matching funds forced him to limit his speech, and the fact that Mr. Martin triggered matching funds in 2006, Mr. Martin was unable during his deposition to recall whether he had ever triggered matching funds. (Doc. 309-8 at 3). It follows that if matching funds were a serious concern, Mr. Martin would know whether he had triggered such funds. Mr. Martin also testified he has supported legislation to repeal the Act, and his opposition to matching funds is based, at least in part, on the provision that if you accept government funding "you're not allowed . . . to support your own campaign over a certain amount." (*Id.* at 9). Thus, it appears that Mr. Martin's real focus has been on public funding of elections in general, and not matching funds in particular.

e. Robert Burns

Robert Burns is an Arizona State Senator. Mr. Burns was first elected in 2002, was reelected in

2008, and plans on running in the 2010 election. (Doc. 288-6 at 91). During the 2008 campaign, Mr. Burns, a non-participating candidate, exceeded the matching funds threshold. (Doc. 354 at 7). He claims "the existence of matching funds coerces traditionally funded candidates into changing their message and the timing of getting out their message, even if ultimately the amount of messaging a traditional candidate chooses to engage in does not change."

But Mr. Burns' deposition seems to indicate that matching funds have had little to no impact on his campaign activities. For example, Mr. Burns was unable to state whether he had reduced his campaign communications because of the possibility of triggering matching funds. (Doc. 309-11). In fact, some of his testimony seems to indicate Mr. Burns simply communicated his message to the extent he felt necessary to win. (Doc. 309-11 at 5 "If I had to spend X number of dollars to get out a – a mailer, and I had that amount of money, I would go ahead and do the mailer.").

f. Rick Murphy

Rick Murphy is an Arizona State Representative. Mr. Murphy was elected to the Arizona House in 2004 and was reelected in 2006 and 2008. Mr. Murphy accepted public funds in 2004 but ran as a non-participating candidate in the 2006 and 2008 campaigns. Mr. Murphy now claims he was coerced into accepting public funding for the 2004 campaign,

but the record does not provide an explanation of this coercion.[10] During the 2006 campaign, Mr. Murphy claims he "curtailed [his] speech and curtailed [his] fundraising in order to prevent [matching funds]." (Doc. 362-1 at 79).

g. Arizona Free Enterprise Club's Freedom Club PAC

The Arizona Free Enterprise Club's Freedom Club PAC ("Freedom Club PAC") "is a Candidate Support or Opposition Committee." (Doc. 288-2 at 6). The Act allegedly harms the Freedom Club PAC because matching funds are triggered when it speaks out in favor of certain candidates. (Doc. 288-2 at 21). But the Freedom Club PAC does not make independent expenditures. (Doc. 362-1 at 83). The Freedom Club PAC contributes to Arizonans for a Sound Economy, another PAC, and it is this entity which actually expends funds. The Freedom Club PAC's treasurer stated matching funds have never prevented it from spending money, but matching funds allegedly have altered the timing of certain expenditures. (Doc. 362-1 at 85).

---

[10] According to one of Mr. Murphy's campaign consultants, Mr. Murphy was not coerced into accepted public funding. In fact, the consultant believes Mr. Murphy "would not have been elected [in 2004] if Clean Elections did not exist." The consultant reached this opinion because Mr. Murphy was not an incumbent and did not having [sic] the contacts necessary to independently raise funds. (Doc. 309-9 at 8).

h. Arizona Taxpayers Action Committee

The Arizona Taxpayers Action Committee ("ATAC") is an Independent Expenditures Committee that was organized in 2006. It claims it "did not speak in opposition to a publicly funded candidate in the District 1 Senate primary race to avoid triggering matching funds to that candidate." (Doc. 288-2 at 7). Defendants counter that the evidence shows no such abstention occurred. Instead, the decision not to spend money was based on the fact ATAC had no money to spend. (Doc. 354 at 9). Based on the unreliable and conflicting evidence, the Court cannot determine which side is presenting the more accurate picture.

ANALYSIS

1. Procedural History

The Court previously denied Plaintiffs' applications for a temporary restraining order and a preliminary injunction. (Doc. 30, 185). In the ruling denying the preliminary injunction, the Court found that the Clean Elections Act "imposes a substantial burden on the First Amendment right to use personal funds for campaign speech."[11] (Doc. 185 at 10). The Court also found Defendants had not established a

---

[11] The prior rulings did not address the precise nature of the burden allegedly imposed upon Plaintiffs. As explored below, identifying the burden is more difficult than that alluded to by the prior rulings.

compelling state interest justifying that burden. (Doc. 185 at 14). The preliminary injunction was denied, however, because of the "extraordinary balance of the harms required in the context of an ongoing election." (Doc. 185 at 18). The parties have now completed discovery and have filed motions for summary judgment.

II. Standard For Summary Judgment

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

III. Proper Standard of Review

The first disagreement between the parties is the proper standard of review. According to the Ninth Circuit, if the Act "places a severe burden on fully protected speech and associational freedoms," the court must apply strict scrutiny. *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). But if the Act "places only a minimal burden on fully protected speech and associational freedoms, or if the speech and associational freedoms

are not fully protected under the First Amendment, [courts] apply a lower level of constitutional scrutiny." *Id.* Thus, the proper standard of review depends upon two inquiries. First, what type of speech is at issue? And second, is that speech being burdened?

A. Type of Speech

Based on longstanding Supreme Court precedent, there is an important distinction between contributions and expenditures. Contributions are not considered "to be fully protected political speech." *Lincoln Club of Orange County*, 292 F.3d at 938. Instead, "contributions are merely speech by proxy," and do not merit full protection. *Id.* Expenditures, however, are recognized as fully protected speech. Candidates have a "First Amendment right to engage in unfettered political speech," such as the expenditure of their personal funds. *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759, 2771 (2008). Thus, if the Act is seen as burdening contributions, it will be subject to a lower level of scrutiny; if the Act is seen as burdening expenditures, it will be subject to a higher level of scrutiny; and if the Act is seen as a burden on both expenditures and contributions, the higher level of scrutiny is appropriate. *Lincoln Club of Orange County*, 292 F.3d at 938 (applying strict scrutiny to provision regulating both contributions and expenditures).

Defendants argue the Act "is fundamentally a restriction on contributions." (Doc. 382 at 6). This is

an oversimplification. For a primary campaign, matching contributions are explicitly tied to a candidate's "expenditures." While those expenditures might consist of a candidate spending contributions from third parties, it is possible for a candidate to trigger matching funds during the primary based on his or her expenditure of personal funds. For the general campaign, matching funds are dependent on "contributions," but the expenditure of personal funds is also defined as a "contribution." Accordingly, the Act has the ability, if not always the effect, of regulating expenditures in both the primary and general campaigns. The Act's burden must be evaluated in terms of potentially affecting "fully protected speech." *Lincoln Club of Orange County*, 292 F.3d at 938.

B. Level of Burden

According to Plaintiffs, matching funds place a "drag on campaign speech." (Doc. 297 at 15) That drag is present because "Matching Funds cause the vigorous exercise of First Amendment rights by Plaintiffs, political action committees and their supporters to produce fundraising advantages for their opposing government-subsidized candidates." (*Id.*) In other words, Plaintiffs allege they will refrain from raising funds or spending their personal monies to prevent participating candidates from receiving matching funds. This, according to Plaintiffs, is a severe burden on their free speech rights. Plaintiffs' argument relies in large part on the Supreme Court's recent decision in *Davis v. Federal Election Commission*, 128 S. Ct.

2759 (2008). While *Davis* is instructive, it does not answer the precise question now before the Court.

In *Davis*, the Supreme Court addressed the so-called "Millionaire's Amendment" contained in the federal Bipartisan Campaign Reform Act of 2002. According to that amendment, when a candidate's expenditure of personal funds exceeded $350,000, the candidate's opponent became eligible to accept contributions from individuals at treble the normal limit. The opponent also became eligible to accept unlimited "coordinated party expenditures," *i.e.* expenditures by national or state political party committees. The Supreme Court concluded the amendment "requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." The discriminatory fundraising limitations constituted the "special and potentially significant burden" of conferring a "fundraising advantage[ ] for opponents in the competitive context of electoral politics." *Id.* at 2772.

In some respects the burden Plaintiffs allegedly suffer in this case is analogous to the burden in *Davis*. Plaintiffs submit evidence that they have felt "chilled" and that but for the matching provisions they would have spent or will spend more money on campaigns. Thus, it appears that in Plaintiffs' view, the "burden" is that an exercise of their First Amendment right to spend as much as they wish will result in Arizona conferring an additional benefit on

publicly-financed candidates. Those candidates presumably will spend the matching funds, *i.e.* generate more speech. In other words, the "burden" created by the Act is that Plaintiffs' speech will lead directly to more speech. Given that the purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources," it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited "burden" on Plaintiffs. *Buckley v. Valeo*, 424 U.S. 1, 49.

Another strange aspect of the alleged burden is that public financing of elections is permitted by the Constitution. If the Act provided for a single lump sum award, instead of incremental awards, the law would fall squarely within the regime blessed in *Buckley* and reaffirmed in *Davis*. Presumably the Act would also be permissible if the incremental awards were linked to some occurrence other than a non-publicly financed candidate's speech. Thus, Plaintiffs are left to argue their First Amendment rights are violated not by the fact of public financing, or the level of that financing, but by the fact that Arizona provides incremental grants linked to their activities. If a single lump sum award[12] would not burden

---

[12] Based on the practical realities, this entire case only makes sense under the assumption that single lump sum awards are not fiscally possible. No rational candidate would prefer a system wherein his opponents receive the maximum award in a single lump sum instead of incremental awards.

Plaintiffs' free speech rights in any cognizable way, finding a burden solely because of the incremental nature of the awards seems difficult to establish.[11]

Despite the unsettling nature of Plaintiffs' claims, *Davis* requires this Court find Plaintiffs have established a cognizable burden. Plaintiffs face a choice very similar to that faced in *Davis*: either "abide by a limit on personal expenditures" or face potentially serious negative consequences. In *Davis*, the negative consequence was having one's opponent subject to higher contribution limits. Here, the negative consequence is having one's opponent receive additional funds. "Arguably the benefit conferred by [matching funds] is more constitutionally objectionable than increasing an opponent's individual contribution limits. In the latter scenario, the opponent must still go out and raise the additional contributions . . . [Matching funds], by contrast, ensure[ ] that there will be additional money to counteract the excess expenditures by the non-participating candidate. . . ."

---

[11] Using the amounts available for a general election for a legislative candidate as an example, the spending limit is $19,382. Once a non-participating candidate spends more than that amount, the participating opponent receives dollar-for-dollar matching funds, up to a maximum of approximately $54,000. Arizona could award an initial grant of $54,000 to each legislative candidate who opted for public financing, and this award would constitute no constitutionally prohibited "burden" on Plaintiffs' rights. Thus, Plaintiffs' argument is that an award under the current regime of $25,000 (the initial grant plus some matching funds) violates their rights, but an award of twice that amount (not based on matching funds) would not.

Green Party of Connecticut v. Garfield, 2009 WL 2730525, at *67 (D. Conn. 2009). Accordingly, if the statute in *Davis* constituted a burden, matching funds must also constitute a burden.[14]

Determining that matching funds constitute a cognizable burden does not end the inquiry. The weight of that burden must also be assessed. Unfortunately, *Davis* provided no guidance on how the

---

[14] The pre-Davis precedents from other circuits no longer appear valid. In analyzing North Carolina's matching funds regime, the Fourth Circuit found matching funds impose no burden whatsoever. That court ruled that even with matching funds, candidates "remain[ed] free to raise and spend as much money, and engage in as much political speech, as they desire. They will not be jailed, fined or censured if they exceed the trigger amounts." *N. Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008). The distribution of matching funds "furthers, not abridges, pertinent First Amendment values by ensuring that the participating candidate will have an opportunity to engage in responsive speech." *Id.* Of course, the same rationale could apply to the statute at issue in *Davis*, but the Supreme Court decided otherwise. The First Circuit also concluded matching funds pose no burden. *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000). In so holding, that court found plaintiffs had "misconstrue[d] the meaning of the First Amendment protection of their speech. They have no right to speak free from response. . . . [t]he public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Id.* Again, this holding cannot be reconciled with *Davis*. If the mere *potential* for your opponent to raise additional funds is a substantial burden, the granting of additional funds to your opponent must also be a burden.

statute at issue constituted a "substantial burden" on the plaintiffs' rights. After explaining its holding that discriminatory fundraising limitations constituted a burden, the *Davis* court jumped to the conclusion that the burden was "substantial."[15] This *ipse dixit* was announced "without the slightest veneer of reasoning to shield the obvious fiat by which it [is] reached." *Francis v. Henderson*, 425 U.S. 536, 552 (1976) (Brennan, J. dissenting). But the lack of reasoning does not free this Court to ignore the conclusion. If lifting a candidate's opponent's fundraising limitations constitutes a "substantial burden," awarding funds to a candidate's opponent must constitute a "substantial burden" as well. Accordingly, Arizona's matching funds constitute a substantial burden and are permissible only if they are supported by a compelling government interest and are narrowly tailored to achieve that interest.

IV. The Burden Fails Strict Scrutiny

Having found the Act constitutes a substantial burden, Defendants must show the Act is "narrowly tailored to serve a compelling state interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). "Further, 'if a less restrictive alternative

---

[15] This was directly contrary to the lower court's factual finding that the Millionaires' Amendment was having no chilling effect. *Davis v. FEC*, 501 F. Supp. 2d 22, 31 (D.D.C. 2007).

would serve the Government's purpose, the legislature must use that alternative.'" *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009) (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). The Act does not meet any of these requirements.

A. The Act is Not Supported by a Compelling Interest

Davis states the *only* legitimate and compelling interest is the elimination of corruption or the perception of corruption. Based on earlier cases, the contours of this anticorruption concern are far from clear.[16] But the most recent Supreme Court cases seem to recognize corruption only in the sense of "politicians [being] too compliant with the wishes of large contributors." *Nixon*, 528 U.S. at 389, 390. In other words, the only legitimate anticorruption interest is in preventing the reality or appearance of *quid pro quo* arrangements between politicians and contributors. This type of anticorruption interest supports some aspects of the Act, but it does not

---

[16] The Supreme Court has repeatedly *upheld* statutes "designed to protect against the undue influence of aggregations of wealth on the political process." 128 S. Ct. at 2781 (J. Stevens dissent). There is at least an open question whether a state's anticorruption interest includes countering "the corrosive and distorting effects of immense aggregations of wealth" on the political process. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

support the Act's application to self-financed candidates.

Under the Act, if a candidate wishes to expend his or her own money, that expenditure will trigger the "burden" of matching funds. Defendants have not identified any anticorruption interest served by burdening self-financed candidates' speech in this manner. In fact, the Supreme Court has recognized that "reliance on personal funds *reduces* the threat of corruption" and "discouraging use of personal funds disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773. Thus, there is no compelling interest served by the Act.

B. The Act is Not Narrowly Tailored

The conclusion that the Act is not serving a valid anticorruption interest also leads to the conclusion that the Act is not narrowly tailored. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 785 (1988). The Act allegedly seeks to target and eliminate the "evil" of the appearance or reality of corruption. But the Act places a burden on a candidate's expenditure of personal funds even though there is no apparent and constitutionally recognized anticorruption interest served by such a restriction. Thus, the Act "significantly restrict[s] a substantial quantity of speech

that does not create" the appearance of corruption.[17] *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989). The Act is not narrowly tailored.

C. The Act is Not the Least Restrictive Alternative

Finally, the Act is not the least restrictive alternative. At the very least, the Act could have been structured such that it does not place a burden on a candidate's expenditure of personal funds. For example, the Act could tie matching funds solely to contributions made by third parties to a candidate. Such a structure would achieve the anticorruption goal recognized by the Supreme Court without burdening a candidate's decision to expend personal funds.

The Act, in its current form, is not supported by a compelling interest, is not narrowly tailored, and is not the least restrictive alternative. The Act is unconstitutional under the First Amendment.

---

[17] At oral argument on the motions for summary judgment, Defendants stressed that "[t]he point of matching funds is not to deter self-financing," it is "to incentivize participation in the public financing system thereby reducing the risk of corruption." But this argument does not answer the narrowly tailored issue in that matching funds present a burden on speech.

V. Equal Protection Claims

Plaintiffs claim the Act violates their right to equal protection based on participating and non-participating candidates being treated "differently with respect to direct expenditures, independent expenditures or contributions made on their behalf" (Doc. 1 at 18). Because the Act violates the First Amendment, the Court need not resolve this issue.

VI. Severability

Plaintiffs' stated goal is a declaration that the matching funds portion of the Act violates their right to free speech. (Doc. 260 at 25-26). Matching funds, however, is just one aspect of the Act. The parties apparently believe the matching funds provision can be severed from the Act. There is disagreement, however, on whether portions of the matching funds provision can be severed.

The Court raised the issue of severance prior to the arguments on the summary judgment rulings. The parties were then instructed to brief the issue. In their briefing, Plaintiffs argue severance is not feasible. Defendants counter that severing the link between personal expenditures and matching funds is a relatively straightforward step capable of quick implementation. While Arizona utilizes a very lenient severance standard, the severance now proposed by Defendants is not possible.

"Severability is . . . a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Pursuant to Arizona law regarding an act enacted by an initiative, "in deciding whether to sever the invalid portion of a measure adopted by popular vote and uphold the remaining, valid portion," a court must "first consider whether the valid portion, considered separately, can operate independently and is enforceable and workable. If it is, [the court must] uphold it unless doing so would produce a result so irrational and absurd as to compel the conclusion that an informed electorate would not have adopted one portion without the other." *Randolph v. Groscost*, 989 P.2d 751, 755 (Ariz. 1999). The presence of an express severability clause requires "all doubts . . . be resolved in favor of severability."[18] *Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 713 (Ariz. 2000).

During the general election, the Act awards matching funds based on contributions by individuals to a candidate, a candidate's expenditure of personal funds, and expenditures by a person or political committee advocating the election or defeat of a specific candidate and made without the cooperation of the candidate. A.R.S. § 16-952. As decided above, the

---

[18] The Act contains a very broad severability clause that states, in relevant part, "[i]f a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application." A.R.S. § 16-960.

application of matching funds to personal expenditures is unconstitutional because Defendants have no valid interest in burdening these expenditures. Defendants may, however, have a valid interest in burdening independent expenditures and contributions by individuals to candidates. Thus, Defendants argue the Court should prohibit matching funds based on personal expenditures but permit matching funds based on contributions and independent expenditures.

Severance requires the portion remaining be "enforceable and workable." *Randolph*, 989 P.2d at 755. Inherent in this test is the requirement that severance can occur only when the remaining portion is workable *without further action* by the State. For example, in *Myers*, the Arizona Supreme Court was presented with the issue of whether it could sever a portion of the Act regarding the appointment of members of the citizens clean election commission. *Myers*, 1 P.3d at 712. As originally drafted, the Act required the commission on appellate court appointments nominate the candidates for the commission. The Arizona Supreme Court found the Act expanded the duties of the commission on appellate court appointments in a manner "inconsistent with the Arizona Constitution." *Id.* Therefore, the court invalidated that portion of the Act, essentially excising it. Next, the court concluded that severing all references to the commission on appellate appointments did not materially impact the operation of the Act. Upon severance, the Act remained fully operational. That

is, the Act was workable without *any* statutory or regulatory changes. The situation here is different.

Were this Court to sever certain portions of the matching funds provision, Defendants concede various regulatory changes would be required. Without these changes, the Act would not be enforceable and workable. Defendants expended considerable effort in supplemental briefing, including attaching a proposed revised regulation, to persuade the Court that severance is uncomplicated. But these efforts did not meet the mark. As illustrated by Plaintiffs, severance would raise a variety of issues that would require administrative intervention to resolve. For example, the regulations governing matching funds would need to be revised to accommodate issues regarding loans obtained by candidates and in-kind contributions by candidates. Defendants agree that such revisions would have to be drafted, presented for public comment, and then submitted to the Department of Justice for approval. The Act, after a limited severance, is not workable absent further action. Thus, the matching funds provision cannot be selectively severed as Defendants propose.

VII. Stay Pending Appeal

Federal Rule of Civil Procedure 62(c) provides that "[w]hile an appeal is pending from . . . [a] final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms

that secure the opposing party's right." A court must consider four factors when evaluating a request for a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). "There is substantial overlap between these and the factors governing preliminary injunctions," but the tests are different in that the test for a stay appears slightly easier to meet.[18] *Id.*

When deciding whether to grant a stay, "[t]he first two factors . . . are the most critical." *Id.* The first factor – likelihood of success – requires the prospect of success be more than "negligible." *Id.* Although the Supreme Court in *Nken* did not offer elaborate analysis of the first factor, the Court did make plain what the factor was not: it is not enough that the chance of success on the merits be "negligible" or that there is a "mere possibility of relief" *Id.* Here, it is possible the Ninth Circuit will agree with the majority of the other circuits to hear this type of challenge and find no First Amendment violation. This Court believes the *Davis* decision casts

---

[18] Delaying the effective date of the Court's order clearly qualifies as a "stay" in that it will "suspend judicial alteration of the status quo." *Nken*, 129 S. Ct. at 1758 (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986)).

grave doubt on the earlier decisions, but there is more than a "mere possibility" the Ninth Circuit will disagree. Similarly, the Ninth Circuit might take a different view regarding permissible severance options. Thus, the Court believes there is a sufficient question regarding the likelihood of success to grant a short stay to allow the Ninth Circuit to bring its considered judgment on the issues.

The second factor – possibility of irreparable injury – requires there be more than a mere possibility of injury. *Id.* Defendants will suffer irreparable injury in the absence of a stay. Invalidating matching funds changes the entire election landscape. Once the injunction takes effect, candidates will have to change their election and fundraising strategies. In particular, candidates may begin to collect contributions they would otherwise be prohibited from collecting. Even if the appellate court were to later reinstate matching funds, those candidates would be ineligible to receive the funds. Accordingly, the first two factors weigh in favor of a stay.

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party." *Id.* at 1762. Given the Court's finding that the matching funds provision violates the First Amendment, the continued existence of matching funds undoubtedly harms Plaintiffs. But that harm will not be felt in the immediate future. Candidates who wish to raise funds or spend personal

monies without the consequence of triggering matching funds may do so while this stay is in effect because no matching funds would be awarded at this time. The third factor weighs in favor of a stay.

Finally, the public interest weighs in favor of allowing the Act to remain in place for a short time while appellate review is sought. Given the substantial impact a change to Arizona's election law will have, the public has an interest in permitting a brief window for appellate review prior to implementation of that change.

Based on the above factors, a stay of the injunction is appropriate. Granting a stay is in no way meant to derogate the decision that the Act is unconstitutional and that the unconstitutional components of the Act cannot be severed. The discussion of the factors for granting a stay assumes only a brief stay. A stay of any substantial length, such as until the end of the 2010 elections, would not be appropriate. A stay of that length would reverse the factors such that the harm to the Plaintiffs would outweigh other considerations.

The injunction against matching funds will be stayed for ten days to allow Defendants to seek additional relief, such as a stay, from the Ninth Circuit. This ten-day stay is contingent on the Defendants filing a notice of appeal within five days of this Order. If Defendants do not file a notice of appeal within five days, the injunction shall take effect immediately.

Accordingly,

IT IS ORDERED the Motions for Summary Judgment (Doc. 287, 288) are **GRANTED**. Arizona Revised Statutes section 16-952 may not be applied.

IT IS FURTHER ORDERED the Motions for Summary Judgment (Doc. 285, 293) are **DENIED**.

IT IS FURTHER ORDERED the Motion for Leave to File Separate Response (Doc. 373) is **DENIED**.

IT IS FURTHER ORDERED the Motions to File Supplemental Authority (Doc. 393, 399) are **GRANTED**.

IT IS FURTHER ORDERED the Motion for Status Hearing (Doc. 404) is **DENIED**.

IT IS FURTHER ORDERED the Motion for Preliminary Injunction (Doc. 416) and Motion for Hearing (Doc. 418) are **DENIED**.

IT IS FURTHER ORDERED the Clerk shall enter judgment in favor of Plaintiffs.

DATED this 20th day of January, 2010.

/s/ Roslyn O Silver
Roslyn O. Silver
United States
District Judge

(ORDER LIST: 560 U.S.)

TUESDAY, JUNE 8, 2010

ORDER IN PENDING CASE

09A1163 MCCOMISH, JOHN, ET AL. V. BENNETT, AZ SEC. OF STATE, ET AL.

The application to vacate the stay of the District Court's injunction and to stay the mandate of the United States Court of Appeals for the Ninth Circuit in case No. 10-15165 presented to Justice Kennedy and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

(ORDER LIST: 560 U.S.)

TUESDAY, JUNE 1, 2010

ORDER IN PENDING CASE

09A1133 MCCOMISH, JOHN, ET AL. V. BENNETT, AZ SEC. OF STATE, ET AL.

The application to vacate the stay presented to Justice Kennedy and by him referred to the Court is denied without prejudice to a renewed application if the parties represent that they intend to file a timely petition for a writ of certiorari before this Court. The motion of Buzz Mills for Governor Campaign for leave to file a brief as *amicus curiae* is granted.

(ORDER LIST: 559 U.S.)

TUESDAY, FEBRUARY 16, 2010

ORDER IN PENDING CASE

09A736 MCCOMISH, JOHN, ET AL. V. BENNETT, AZ SEC. OF STATE, ET AL.

The application to vacate the stay presented to Justice Kennedy and by him referred to the Court is denied. Denial is without prejudice to a renewed application on June 1, 2010, or when the Court of Appeals has issued its decision on the merits of the case, whichever date is earlier.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN McCOMISH; et al.,
Plaintiffs-Appellees,
and
DEAN MARTIN; et al.,
Plaintiff-intervenors-Appellees,
v.
KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; et al.,
Defendants-Appellants,
and
CLEAN ELECTIONS INSTITUTE, INC.,
Defendant-intervenor-Appellant.

Nos. 10-15165, 10-15166
D.C. No. 2:08-cv-01550-ROS
District of Arizona, Phoenix
ORDER
(Filed Feb. 01, 2010)

Before: SILVERMAN, PAEZ and BEA, Circuit Judges.

The stay issued by the district court on January 20, 2010 is extended pending further action by the panel assigned to hear the merits of these appeals. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009).

These consolidated appeals are expedited. The briefing schedule is reset as follows. The opening briefs and excerpts of record are due February 9, 2010; the answering briefs are due February 16, 2010; and the optional reply briefs are due within 3 days after service of the last-served answering brief.

All parties on a side are encouraged to join in a single brief to the greatest extent practicable.

This case shall be heard during the week of April 12-16, 2010 in San Francisco, California.

BEA, Circuit Judge, dissenting.

I dissent. I agree with the district court's order of January 20, 2010, that this case is determined by *Davis v. Fed. Elec. Com'n*, ___ U.S. ___, 128 S. Ct. 2759 (2008), because state intervention in the funding of campaign contributions in a manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech of the candidate who spends his money. In *Davis*, if Davis spent more than $350,000 of his own money in his campaign, the contribution limitations placed on how much others could contribute to his *opponents* were lifted, but not for contributions made by others to Davis. *Id.* at 2766-67. Quite naturally, this was found to be a disincentive to Davis spending money on his own campaign, lest the expenditure serve [sic] to give his

opponents an advantage not open to him. Such a disincentive was found to impose a "substantial burden" on Davis' campaign speech which had to be justified under the "strict scrutiny" test. *Id.* at 2771-73.

The primary justification for limiting campaign contributions is to prevent people from giving money to buy influence from politicians. This consideration, however, is not present when a candidate finances his own campaign. *Buckley v. Valeo,* 424 U.S. 1, 23-35, 38, 46-47 and n.53 (1976) (per curiam). In *Buckley,* the Court found a limit on how much money a candidate could spend on his own campaign was not justified by "[t]he primary governmental interest" proffered in its defense, *i.e.*, "the prevention of actual and apparent corruption of the political process." *Id.* at 53. The Court expressly rejected the argument advanced here that the expenditure cap is justified on the ground that it serves an "ancillary interest in equalizing the relative financial resources of candidates competing for elective office." *Id.* at 54 (holding the interest in a level playing field was "clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights.").

Similarly, here any expenditures by Plaintiffs in the primary are matched by funds from the State of Arizona given to the Plaintiffs' opponents. Plaintiffs know that if they buy a television advertisement, at a bargain rate now for June broadcasting, or hire a consultant who might go to the other side, that expenditure will result in "matching funds" going to the candidates they are trying to beat in the July

primaries. Strategically, it makes no more sense for Plaintiffs to spend money now than for a poker player to make a bet if he knows the house is going to match his bet for his opponent.

But, I disagree with Judge Silver and with the majority of this panel that Defendant-Appellants have made a "strong showing" of a probability of success on appeal, which an applicant for a stay pending appeal is required to prove. *Nken v. Holder*, ___ U.S. ___, 129 S. Ct. 1749, 1761 (2009). Just the opposite. It is the Appellee-Plaintiffs who, on the basis of *Davis* and *Buckley*, have made a strong showing of the probability of success.

Further, I disagree with Judge Silver and with the majority of this panel that Defendants have shown the probability of "irreparable injury" to themselves should the stay not be granted, while Plaintiffs have not shown any injury in the immediate future.

That the "entire election landscape" would be changed by effecting the preliminary injunction does not state a particularized harm to any of the Defendants. That the Defendants, as "participating" (state-subsidized) candidates would have to change their fund-raising strategies – perhaps actually to do some fund-raising – does state some direct effect on them. But the "harm" claimed by fund-raising is simply the loss of state subsidies they would otherwise have if they did not raise these funds.

That "harm" is the mirror effect of the harm caused to the Plaintiffs by staying the district court's

order. That is, once the stay is in effect, the Plaintiffs cannot expend money for campaign speech from now until the determination of the appeal – perhaps through the primary campaign – without causing money from the State of Arizona to flow to their opponents' coffers in equal measure to the Plaintiffs' expenditures.

In accounting terms, Plaintiffs' present expenditure of money on free speech in the campaign creates an immediate and equal account receivable for their opponents, due from the State of Arizona under the Matching Funds program, and to be paid by Arizona for use by the opponents against the Plaintiffs. Between having to hustle for campaign contributions (Defendant-Appellants' harm) and not being able to spend campaign money without helping one's opponents (Plaintiff-Appellees' harm), the balance of harm caused seems greater to Plaintiffs-Appellees.

Yes, enforcement of the preliminary injunction would have a substantial effect on the Arizona 2010 election. However, change is always uncomfortable for the vested interests - here, that of "participating" candidates who look forward to state subsidies for their campaigns. But where First Amendment free speech interests are involved, the comfort level of those causing the "chilling effect" on speech is irrelevant.

"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the

people . . . For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. . . . Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United v. Fed. Elec. Com'n*, ___ U.S. ___, 2010 WL 183856 at *18-19 (January 10, 2010).

Here, the participating candidates are "preferred" by the State of Arizona because Arizona matches the Plaintiffs' expenditures for speech with public monies which the preferred candidate can spend on speech.

Where, as here, the district court has found the Arizona statute would have a "chilling effect" on the Plaintiffs' free speech, we should respect that factual finding unless it constituted an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). The district court's finding that the Matching Funds given opponents will inhibit the Plaintiffs from spending their own money for campaign free speech is not (1) illogical, (2) implausible or (3) lacking inferences which can be based in the record. Thus, it is not an abuse of discretion. *Id.*

For these reasons, I respectfully dissent. I would deny the stay, and allow the preliminary injunction to take effect today, as the 10-day stay granted by the district court expires.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN McCOMISH; et al., Plaintiffs-Appellees, v. KEN BENNETT, in his official capacity as Secretary of State of Arizona; et al., Defendants-Appellants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-intervenor, v. DEAN MARTIN; et al., Plaintiff-intervenors-Appellees.	No. 10-15165 D.C. No. 2:08-cv-01550-ROS District of Arizona, Phoenix

JOHN McCOMISH; et al., Plaintiffs-Appellees, v. KEN BENNETT, in his official capacity as Secretary of State of Arizona; et al., Defendants, and	No. 10-15166 D.C. No. 2:08-cv-01550-ROS District of Arizona, Phoenix ORDER (Filed Jan. 29, 2010)

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-intervenor, Appellant,

v.

DEAN MARTIN; et al.,

Plaintiff-intervenors-Appellees.

Before: SILVERMAN, PAEZ and BEA, Circuit Judges.

This court sua sponte consolidates appeal Nos. 10-15165 and 10-15166. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. *See* 9th Cir. R. 28-4. The briefing schedule remains unchanged.

Appellees' emergency motion to vacate the temporary appellate stay is denied.

Appellants' emergency motions for a stay pending appeal will be addressed by separate order.

BEA, dissenting.

I would grant appellees' motion to vacate the temporary appellate stay.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John McComish, et al., Plaintiffs, vs. Jan Brewer, et al., Defendants.	No. cv-08-1550-PHX-ROS **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has denied Plaintiff's Motion for Preliminary Injunction which sought to block distribution of matching funds to participating candidates under the Citizens Clean Elections Act A.R.S. §§ 16-940 *et seq.* (the "Act" or "Arizona Act"). Findings of Fact and Conclusions of Law in support of that decision are set forth below.

BACKGROUND

The Citizens Clean Elections Act was approved by voters in 1998. The Act sets up a voluntary system of campaign financing in which candidates who choose to be "participating candidates" may receive funds from the Citizens Clean Elections Fund ("CCEF"). Candidates who elect to participate must collect the required number of $5 "qualifying contributions" from voters registered in their district. If they qualify, they receive a base-level grant from the

Clean Elections fund.[1] *See* A.R.S. §§ 16-941, -945; *see also*, Citizen Clean Elections Commission, "Voter Education Guide" (2008) *available at* http://www.ccec.state.az.us/ccecweb/ccecays/ccecPDF.asp?docPath=docs/2008PrimaryCandidateStatementPamphlet.pdf.

When participating candidates have opponents who are non-participating – "traditional" candidates – they can also receive matching funds. Once a traditional candidate's contributions and expenditures exceed the base-level grant given to participating candidates, her participating opponent or opponents will receive almost dollar-for-dollar matching funds from the CCEF. These funds cap out at three times the applicable spending limit.[2] Independent expenditures by Political Action Committees ("PAC's") made on behalf of a candidate – traditional or participating – or in opposition to her participating opponent also count towards the spending limit.

The first section of the statute is entitled "Findings and Declarations," which declares an intent by the people of Arizona "to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of

---

[1] Legislative candidates receive $12,921 for the primary and $19,382 for the general election. Corporation Commission candidates receive $82,680 for the primary and $124,020 for the general election.

[2] The matching funds are a dollar-for-dollar match minus 6% meant to compensate for the fundraising expenses incurred by traditional candidates. A.R.S. § 16-952(A).

special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions." The provisions lay out a number of findings about the pre-Clean Elections financing system, stating that it:

> 1. Allows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;
>
> 2. Gives incumbents an unhealthy advantage over challengers;
>
> 3. Hinders communication to voters by many qualified candidates;
>
> 4. Effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests;
>
> 5. Undermines public confidence in the integrity of public officials;
>
> 6. Costs average taxpayers millions of dollars in the form of subsidies and special privilege for campaign contributors;
>
> 7. Drives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and
>
> 8. Requires that elected officials spend too much of their time raising funds rather than representing the public.

Plaintiffs and Plaintiff-Intervenors are candidates for office and a Political Action Committee who argue that these matching funds chill their political speech and are a violation of their First Amendment rights. Plaintiff John McComish is an incumbent candidate for the Arizona State House of Representatives' District 20 running as a traditional candidate. The Arizona Secretary of State has designated McComish's district as a single party dominant district favoring the Republican Party, of which McComish is a member. However, he argues that "[b]oth the Republican and Democratic Party organizations now view [his] district as being a competitive district." There are two seats available in McComish's district; each major party is allowed to nominate two candidates. Thus, McComish is running against both a subsidized Democratic opponent, Rae Waters, and a subsidized Republican opponent, Jeff Dial. As of September 22, 2008, both Dial and Waters had more cash on hand than McComish.

In his affidavit, McComish states that "in the absence of the Clean Elections Act, [he] would certainly amass campaign contributions, personal contributions or personal loans to [his] campaign beginning on September 3, 2008 in excess of $25,000." However, due to the matching fund provisions, he "will certainly neither raise campaign contributions, contribute to, nor loan [his] campaign any amount more than $14,000 above any applicable general election spending limit." Further, he states "[l]ikewise, I will be more fearful of promoting my candidacy and less

active in promoting my candidacy than in the absence of the Clean Elections Act, for fear that my opposing subsidized candidate will receive one dollar for every dollar someone or some organization independently spends to support my campaign." P. Ex. 20. McComish also states that around August 20, 2008, he decided not to spend money on an "auto-dialer" program, which cost about $2,500, to avoid triggering matching funds for his opponent. McComish anticipates triggering matching funds at some point during the general election. P. Ex. 19.

During the primary election, McComish stated that some $6,000 was spent on his behalf as an independent expenditure by the Arizona Realtors Association. McComish has stated that expenditure "hurt more than it helped;" while "the expenditure on [his] behalf was not consistent with what [he] was trying to do . . . [his] opponents received the cash so that they could use it efficiently." The Arizona Realtors Association apparently did not confer with McComish before sending the mailing.

Plaintiff Nancy McLain is the incumbent candidate for the Arizona House of Representative's third district. She is a member of the Republican party who is running as a traditional candidate. She has two participating opponents, Republican Doris Goodale and Democrat Pamela Durbin, both of whom had more cash on hand than McLain as of September 22nd, 2008. Due to an increase in the number of independent voters in her district, McLain believes that the 2008 general election might be close. Ex. 22,

pg. 72. McLain states that "there is no question that . . . my campaign speech will be chilled by the Act's matching funds provision," though she could not identify "specific dollar amounts that [she] will not contribute or loan [her] campaign." She adds:

> I will be made more reluctant to personally contribute or loan money to my campaign than I otherwise would have been in the absence of these provisions, knowing that my opposing participating candidate in the general election, Pamela Durbin, will receive nearly one dollar for every dollar I raise and one dollar for every dollar someone independently spends to support my campaign.

McLain has also stated that she has made the decision not to raise any more funds for the 2008 election, though she is unsure of whether she will return any unsolicited contributions. Ex. 22, pg. 93.

Plaintiff-Intervenor Robert Burns is an Arizona State Senator representing Legislative District 9. He is a traditional candidate running against a participating opponent. Burns states that he is forced to "censor [himself] in order to avoid triggering matching funds to [his] government-funded opponent." Ex. 50. He adds that he "will be forced to stop accepting contributions to [his] campaign to make sure that [he does] not exceed the Act's expenditure limitations for this race." *Id.* On one occasion, he turned away a contribution check in order to avoid triggering matching funds. Ex. 155, pg. 45. Burns is running in a

heavily Republican district that is not one the Democrats tend to heavily target. Ex. 155, pg. 10.

Plaintiff-Intervenor Rick Murphy is an Arizona State Representative representing Legislative District 9. He is running for re-election as a traditional candidate and has three participating opponents. Thus, for every dollar Murphy raises above the spending limit, three dollars will be disbursed to his opponents – one to each participating candidate. As a result, he states, he may "be forced to forgo any fundraising in order to avoid assisting [his] opponents by sending government checks directly to their taxpayer financed campaign war chests." Ex. 51.

The final Plaintiff-Intervenor is the Arizona Taxpayers Action Committee ("ATAC"), an Independent Expenditures Committee that was organized in 2006 and made independent expenditures on behalf of a legislative candidate in a primary election that same year. The group's treasurer states that the group intends to participate in 2008 legislative races, however, "a decision must be made whether to engage in the political speech that represents our donors' interests, but which may aid the very candidate whom Arizona Taxpayers oppose." Ex. 52. ATAC alleges that the knowledge that its donations will aid a candidate it opposes "will prevent [ATAC] from the full and unrestricted exercise of its speech," and therefore that "the Act creates a climate of self-censorship resulting in less political speech." However, Defendant-Intervenors note that not only has ATAC only made one donation to a state legislative race in its history

(it has also made at least one donation in a city council race for mayor), it has "made no attempt to raise funds" in this current election cycle and has no current plans to do so before the election. Ex. 157, pg. 35, 62-66. Further, as of August 13, 2008, the group had only $52.72 in its bank account. Ex. 157, pg. 62.

ANALYSIS

I. Standard

The Ninth Circuit provides two alternate tests for granting a preliminary injunction – or rather, one test with two polarized formulations. In the first formulation, a plaintiff must show:

> (1) a strong likelihood of success on the merits,
>
> (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted,
>
> (3) a balance of hardships favoring the plaintiff, and
>
> (4) advancement of the public interest (in certain cases).

Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291 (9th Cir. 2003) (quoting *Johnson v. Cal. State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995). Alternately, a plaintiff may "demonstrate[ ] '*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor'" *Id.* These two tests represent a

continuum; "[t]hus, the greater the relative hardship to [Plaintiffs] the less probability of success must be shown." *Earth Island*, 351 F.3d at 1298.

Some Ninth Circuit cases also add a statement to the effect that "[i]f the movant 'has a 100% probability of success on the merits,' this alone entitles it to reversal of a district court's denial of a preliminary injunction, without regard to the balance of the hardships." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002). However, this proposition seems to lead back only to *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102 (9th Cir. 1998), in which the court gave the standard for a preliminary injunction as usual then decided that, in that particular case, a *permanent* injunction was in order without remand to the district court for a full trial on the merits. The court did not engage in any analysis regarding the balance of the harms in that case, nor did it appear to be a contested issue. This Court has not concluded that it is appropriate for a district court to discard the balance of the harms analysis where the court judges that there is any chance that additional useful evidence could be adduced at a full trial on the merits,[3] especially in the

---

[3] In *Baby Tam*, the court concluded:

> Because the ordinance is unconstitutional, Baby Tam has a 100% probability of success on the merits of its suit to obtain a permanent injunction. No facts which might be adduced at a trial [on the permanent injunction] will change this result. Accordingly, there is no need to remand for a trial. Baby Tam is entitled to a

(Continued on following page)

volatile and unpredictable context of an election where a court is always anchored neutrally and loath to in any manner influence who will be triumphant. This is particularly true where, unlike, apparently, in *Baby Tam*, vital interests are implicated on both sides of the balance of the hardships analysis.

II. Application

A. Plaintiffs Have Shown a Strong Likelihood of Success on the Merits.

The issue in dispute is whether the matching funds provisions of the Clean Elections Act violate the First Amendment of the Constitution. If it "imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, [it] cannot stand unless it is 'justified by a compelling state interest.'" *Davis v. Fed. Election Comm'n.*, 128 S. Ct. 2759, 2772 (2008). *Id.* In considering this question, it might be helpful to look briefly at the history of campaign finance jurisprudence. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court rejected a cap on expenditures by candidates of their personal funds. The Court explained that a "candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election," and

---

permanent injunction prohibiting the City from enforcing the ordinance in its present form.

154 F.3d at 1102.

that a cap on personal expenditures by a candidate constitutes "a substantial," "clea[r]," and "direc[t] restraint on that right." *Id.* at 52. Thus, while states may place certain reasonable limits on campaign *contributions*, personal expenditures may not be restrained. *Id.* at 21-22, 51. Campaign contributions may not prevent "candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21.

Subsequent decisions have added layers of nuance to *Buckley*'s original distinction. Matching funds, such as those found in Arizona's Act, have been a hotbed of controversy. Proponents argue that they place no limitations on personal campaign expenditures or on campaign contributions that might fall afoul of *Buckley*. Opponents, on the other hand, argue that, through forcing traditional candidates to accept expenditure and contribution limits or else trigger funding for speech hostile to themselves, such schemes violate the First Amendment rights of traditional candidates.

The First, Fourth and Sixth Circuits have found matching funds to pass constitutional muster. In *N.C. Right to Life, Inc. v. Leake*, 524 F.3d 427 (4th Cir. 2008), the court held that "[t]he plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire." It continued, "They will not be jailed, fined, or censured if they exceed the trigger amounts." Similarly, the First Circuit, in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), held

that Maine's matching fund provision was constitutional, writing that "[t]he public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Id.* at 464; *see also Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (holding that a Kentucky campaign finance law which lifted expenditure limits for participating candidates when nonparticipating candidates exceeded those limits was constitutional).

Only the Eighth Circuit has found matching fund provisions to be unconstitutional. In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), a Minnesota law provided that candidates would receive one half the amount of independent expenditures made by opposing candidates. The court emphasized the "'self-censorship' that has occurred even before the state implements the statute's mandates," ultimately "no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship." *Id.* at 1360. The court also found that the speech restriction could not be considered content neutral: "[i]ndependent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's . . . provisions." *Id.* at 1361. There was, however, one substantial difference between the statute at issue in *Day* and the Arizona Act. In Minnesota, the participation rate among candidates was approaching 100%

(in Arizona, it is closer to 60%), leading the court to declare that "no interest, no matter how compelling, could be served" by the restrictions on the remaining candidates. *Id.*

Into this landscape came the recent Supreme Court decision, decided after each of the above Circuits' opinions and highly relevant to the question of matching funds. In *Davis v. Fed. Election Comm'n.*, the Supreme Court considered the constitutionality of the so-called Millionaire's Amendment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). 2 U.S.C. §441a-1(a); *id.* at 2774. The Millionaire's Amendment was triggered when a non-participating candidate's personal expenditures caused her total campaign expenditures to exceed $350,000. At that point, an opposing participating candidate was allowed to receive individual contributions at three times the normal limit (the limit for non-participating candidates remained the same), and could accept coordinated party expenditures without limit. *Id.* at 2766. The *Davis* court found that the asymmetry of this arrangement "impermissibly burden[ed] [the plaintiff's] First Amendment right to spend his own money for campaign speech." *Id.* at 2771. Thus, although under the BCRA candidates can choose to spend their own money as desired, they "must shoulder a special and potentially significant burden if they make that choice." *Davis*, 128 S. Ct. at 2771.

Because the BCRA "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, the provision

[could] not stand unless it [was] 'justified by a compelling state interest.'" *Id.* at 2772. The Supreme Court found that the government's stated interest of "level[ing] electoral opportunities for candidates of different personal wealth" was not a compelling state interest. *Id.* at 2773. "[P]reventing corruption or the appearance of corruption" *are* legitimate. *Id.* However, it did not find that the BCRA was justified by such an interest; "reliance on personal funds *reduces* the threat of corruption, and therefore [the challenged provision], by discouraging use of personal funds, disserves the anticorruption interest." *Id.* (emphasis in original).

The Millionaire's Amendment is not the same as Arizona's matching funds provision. Indeed, in its decision that it impermissibly burdened speech rights, the asymmetry of the Millionare's Amendment – which raised contribution limits for participating but not traditional candidates – was key. The Supreme Court noted that as there is "no constitutional basis for attacking contribution limits on the ground that they are too high," if the "elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits." *Id.* at 2771. However, the *Davis* court focused not merely on the fact that the contributions limit differs for participating and non-participating candidates, but on the fact that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 2772. It, too, cited

to *Pacific Gas & Electric Company v. Public Utilities Commission* noting that, in that case, it found "infringement on speech rights where if the plaintiff spoke it could be forced to help disseminate hostile views." *Id.* at 2772 (internal quotations omitted). In that case, the Supreme Court expounded on the constitutional dangers of such a scheme, writing that while one does not "have the right to be free from vigorous debate," one "*does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." 475 U.S. 1, 14 (1986) (emphasis in original). The "statutorily imposed choice" provided by the BCRA was not sufficient to save its constitutionality. *Davis*, 128 S. Ct. at 2772.

Ultimately, though the Arizona Act's mechanism for funding differs, it enforces substantially the same coercive choice on traditional candidates – to "abide by a limit on personal expenditures" or else endure a burden placed on that right. *Id.* And unlike in *Buckley*, the schemes contemplated in *Davis* and presently do not allow a candidate to, "by forgoing public financing, . . . retain the unfettered right to make unlimited personal expenditures." *Id.* Under both laws, "a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right," by "discriminatory contribution limits" in *Davis* and by matching funds under the Arizona Act. *Id.* The Arizona Act imposes a substantial burden on the

First Amendment right to use personal funds for campaign speech.

The next question, then, is whether the regulation is justified by a compelling state interest. In *Davis*, the Supreme Court explicitly rejected the idea that "level[ing] electoral opportunities" was a compelling government interest, writing that it "has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Id.* at 2773. It noted further that

> [d]ifferent candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of the election.

Id. The second and seventh of the Act's Findings – that the pre-Act system gave an unhealthy advantage to incumbents and that it discourages otherwise qualified candidates who are not independently wealthy – overlap significantly with this interest. Though the phrasing of the second finding, at least, hints that it is aimed at which candidates choose to run as well as at leveling the opportunities of those who are already candidates, it still constitutes governmental interference in the process of selecting candidates and elected officials that the Supreme

Court has found impermissible. These Findings cannot be used to justify the burden on speech the Act imposes.

Reducing corruption and the appearance of corruption *are* compelling government interests. In fact, in *Davis*, the Supreme Court noted that "[p]reventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances" *Id.* at 2773 (quoting *Federal Election Comm'n v. National Conservative Political Action Comm*, 470 U.S. 480, 496-97 (1985) (internal quotations omitted) (emphasis added). Several of the Findings in the Act – notably the first, fourth, fifth, and sixth – fit comfortably under a "reduction of corruption or its appearance" heading. Defendants point to a number of pre-Act newspaper articles that demonstrate, at least, a public perception of or public discourse about corruption of the electoral process in Arizona. Ex. 102, 103; P/I hearing. Defendants also provide the declaration of Prof. Kenneth Mayer, a political science professor at the University of Wisconsin, Madison, who states in his report that Clean Elections has "made Arizona state legislative elections more competitive," decreasing the overwhelming advantage of incumbents and increasing the number of highly contested races. Ex. 119, pg. 6-7. He adds that matching fund provisions are crucial to the success of clean elections programs; in Wisconsin, for instance, only 15.3% of candidates took public funding where there

was no possibility of matching funds. *Id.* at 8. Ultimately, these more competitive races give incumbents "an incentive to be more responsive to the views of the district and to work towards optimal public policy rather than put all of their effort into fundraising." *Id.* at 10.

However, he also notes that "[t]he academic literature has not found a strong relationship between campaign contributions and official acts, in part because we are unable to observe most of what elected officials do." *Id.* at 9. Further, Plaintiff's expert Dr. Marc Osborn argues that "Arizona's campaign contribution limits are adequate at reducing potential interest group influence without the clean elections funding including its matching funds provisions." Ex. 14. He adds:

> Even without the Citizen's Clean Elections Act's Matching funds provisions, Arizona already has an aggressive set of campaign finance restrictions that limit both the ability of non-participating candidates to receive concentrations of contributions and limits individual donors and PACs from concentrating contributions.

Id.

Plaintiffs also provide evidence regarding potential gaming of the matching funds system. For instance, because matching funds will be provided to participating candidates for expenditures that PACs make on behalf of traditional candidates, PACs can

run ineffective, unwished for advertising that generates funds for a participating opponent to use at her discretion. Both McComish and McLain have stated that ineffective PAC expenditures have been made on their behalf without their prior knowledge.[4] Ex. 19, pg. 31; Ex. 22, pg. 41. Though neither have alleged that those expenditures were made as part of a deliberate strategy to generate matching funds for their campaigns, the potential for such strategies to be utilized – or to appear to be utilized – remains an avenue to corrupt the Act's goal and certainly to give it the appearance of corruptibility.

Similarly, where more than one seat is available in a particular district or in a statewide race for Corporation Commission, candidates may run as an unofficial slate, something which appears to have happened in at least a couple of races. Plaintiff Tony Bouie provided reliable evidence that such a strategy had been used against him in the primary election (which he lost). Ex. 2. Bouie had a traditional and a participating opponent who shared, at a minimum, common advertising urging voters to cast each of

---

[4] McLain stated in her deposition that the PAC mailer done in her behalf also supported two other candidates. She stated:

> I have significant policy disagreements – differences, shall we say, not disagreements, with both the Senator, Ron Gould, and with Mrs. Groe. I was not comfortable being associated with the two of them. I had tried to run my own campaign and stand on my own merits.

Ex. 22, pg. 41.

their two votes for the two candidates. *Id.* As a result, every dollar spent above the spending cap by either Bouie or his traditional opponent generated matching funds for the participating opponent, who could then use those funds for the benefit of both slate candidates. Similarly, in the general election, candidates coordinated advertising with each other and, in some cases, shared a common campaign manager. Ex. 9, pg. 41, 45. Candidate for Corporation Commission Paul Newman, in his deposition, also stated:

> I hear that there was a quote, unquote, team of Republicans, one who is going to be running traditionally and two that were going to be running clean. I knew all three individuals, two pretty well . . . And I was pretty outraged about that and I didn't want that team to get elected to the Corporation Commission. And I thought that the outside money interests and having some people run as clean, I thought that was manipulation of the system.

Id. at 79. Whether these slate strategies have been effective or not (and whether Newman's information was correct or not), it is clear that they may attribute to the *appearance* of corruption and the appearance that the Act may be gamed to provide matching funds for speech actually made in a participating candidate's own indirect benefit.[5]

---

[5] Defendants note that there are limits to slate strategies by law – "[c]andidates cannot spend their monies supporting

(Continued on following page)

This potential for gamesmanship mitigates against the anti-corruption interest of the Act not by nullifying any anti-corruption gains but by creating entirely new corruption concerns and injecting them into the public sphere. As Defendants have shown at this point only modest anti-corruption benefits, and as even those remain largely unverifiable, the Act is not justified by the compelling government interest of reducing corruption or the appearance of corruption.

Defendant-Intervenors point to three other potential compelling state interests: (1) "facilitat[ing] communication by candidates with the electorate'" (2) "freeing candidates from the pressures of fund-raising," *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (internal citations and quotations omitted), and (3) creating a viable public financing system that does not "fund[ ] hopeless candidacies with large sums of public money." *Buckley v. Valeo*, 424 U.S. 1, 96 (1976). This third interest need not be considered here. It has never been suggested that this was a goal of the Act's enactment. Furthermore, there has been no argument made that this goal cannot be achieved without burdening speech – by adjusting the public

---

other candidates. *See* A.R.S. §§ 16-905(H), -948(C), Ariz. Admin. Code § R. 2-200104(C)(5). Each candidate must pay his or her own expenses and report them on the campaign finance reports." Be this as it may, it does not change the fact that candidates may share advertising and associate themselves as a slate, which allows matching funds generated by a candidate to have them used in their own support, a blatant subversion of the Act's principles.

funding available on the basis of whether a district is designated as a single party dominant district, for instance.

The third and eight [sic] Findings of the Act, however, do go toward freeing candidates to communicate with the electorate rather than spending their time fundraising. There is no reason to conclude, however, that this is a compelling government interest that can justify the burdens on free speech that are created by the Act. It has never been found so by the Ninth Circuit and the Supreme Court's formulation in *Davis* – that "[p]reventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances" – strongly implies that few interests indeed would be sufficient to justify such restraints.[6]

Ultimately, Plaintiffs have shown a high likelihood of success on the merits. Because of the questions raised by Defendants and Defendant-Intervenors regarding possible compelling state interests that justify the Act's burden on free speech, this Court declines to state today that Plaintiffs have shown a *certainty* of success on the merits such that, under one possible reading of Ninth Circuit jurisprudence, a preliminary injunction *must* be granted.

---

[6] For this reason, Defendant-Intervenor's citation to *Buckley* in support of this point is rather unpersuasive.

B. Plaintiffs Have Shown Irreparable Injury.

Plaintiffs and Plaintiff-Intervenors will suffer irreparable injury both through the dispensation of funds that will be used to oppose them and through the mere fact that their speech is being burdened. The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. The Balance of Harms and the Public Interest Lie with Defendants.

In order to grant a preliminary injunction, the balance of the harms must tilt in Plaintiffs' favor and the injunction must usually be in the public interest. This third criterion is particularly important here where the injunction seeks to interfere with an ongoing state election. It is not only the parties to this suit that would be affected by issuance of an injunction. Each candidate that stands to trigger or receive matching funds, and the public itself, which has an overriding interest in free and fair elections, also stand to gain or lose by an injunction.

At the outset, courts will interfere with an election in process only in extraordinary circumstances. *See Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (holding that the California recall vote should not be enjoined due to questions about whether punch card voting machines violated the Equal Protection Clause, in

part because "Interference with impending elections is extraordinary and interference with an election after voting has begun is unprecedented."); *see also Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1179 (9th Cir. 1988) (noting that "the voiding of a state election is a 'drastic if not staggering' remedy."); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (holding that, in legislative apportionment cases, "under certain circumstances, such as where an impending election is imminent, and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief" even where the scheme has already been found unconstitutional.). To no surprise, Plaintiffs do not ask the Court to void the results of an election or to enjoin an election in its entirety. However, early voting began October 2nd, 2008, and an injunction of even relatively limited scope must still be considered in the context of an ongoing election.

On the Plaintiffs side, they have shown a very high likelihood that their First Amendment rights of free speech are being restrained. Matching funds disbursed against them as a result of an apparently unconstitutional statute will be used against them by campaign opponents. Several Plaintiffs have provided evidence that their speech is actually being suppressed as a result of their apprehensions of triggering matching funds. This harm -- particularly as it can be extrapolated to other non-party traditional candidates running in contested races – is not

insigificant [sic]. Further, as Plaintiffs point out, "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Reno*, 217 F.3d 162, 181 (3d. Cir. 2000) (internal quotations omitted).

Both the government and the public can, however, claim an interest in a free and fair election. Here, that is a dual edged sword. On the one hand, the election is inextricably linked with the constitutional violations that have pervaded it. On the other hand, the fact remains that it is *inextricably* linked; to halt matching funds now would not undo the harm that has been done. Instead, it would disrupt the justifiable expectations of participating candidates who – matching funds having been in place for ten years – had every reason to rely on them. Defendants have provided evidence showing that, for a number of candidates, matching funds were an important part of their decision to run as participating candidates. Ex. 124; Ex. 114; Ex. 121; Ex. 122. Further, at least one of these candidates has stated that he would not be able to run an effective campaign were matching funds not available. Ex. 122. Nor is it realistic to expect that participating candidates have the networks and resources available to develop and implement an effective fundraising strategy at this late date.

Plaintiffs argue that participating candidates were on notice that matching funds may be cut off due to the provisions in 16-954(j) of the statute and that they cannot be said to have justifiably relied on

distribution of matching funds. However, that statutory provision reads:

> If the commission cannot provide participating candidates with all monies specified under sections 16-951 and 16-952, as decreased by any announcement pursuant to subsection E of this section, then the commission shall allocate any reductions in payments proportionately among candidates entitled to monies and shall declare an emergency. Upon declaration of an emergency, a participating candidate may accept private contributions to bring the total monies received by the candidate from the fund and from such private contributions up to the adjusted spending limits. . . .

The provision – which follows and references provisions discussing what will happen if enough money does not remain in the fund – is clearly a reference to fiscal emergencies rather than eleventh hour litigation. And subsection (D) of that provision specifies that "[a]t least once per year, the commission shall project the amount of monies that the fund will collect over the next four years and the time such monies shall become available." The statute contemplates a sudden fiscal emergency but makes provisions for it. It cannot be stretched to mean that participating candidates ought to have been ready to have their funding source halted as a result of litigation mere weeks, or even mere months, before the election.

The timing of this litigation also deserves special attention. Defendants and Defendant-Intervenors argue that Plaintiffs delayed unreasonably in bringing this suit. Though they provide evidence that many of the Plaintiffs have known about the Clean Elections Act for a matter of years, the Court is not persuaded that they need necessarily have been required to bring their challenge before *Davis* was released and shed new light on the potential constitutionality of the matching funds provisions. *See Lathan v. Brinegar*, 506 F.2d 677, 692 (1974) (holding that it could not be said that the plaintiff was "guilty of an extreme lack of diligence in raising [the] issue" as "NEPA which has a substantial influence upon our interpretation of the effects of the amendments . . . was not operative until January 1, 1970, less than six months before this action was filed."). However, *Davis* was decided on June 26, 2008, well before the general election and even the primary. The delay of almost two months before any action was filed in this court has to bear against the urgency of Plaintiffs' claim and certainly mitigated against any real possibility that participating candidates might have time, after an injunction, to develop their own fundraising strategy. Further, precedent shows that such a delay indicates "an absence of the kind of irreparable harm required to support a preliminary injunction." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985).

Ultimately, in the extraordinary context of an election in progress, Plaintiffs and Plaintiff-Intervenors have not demonstrated sufficient harm to find that

the balance of harms and the public interest tilts in their favor. The countervailing harm that would be done to candidates that relied on Clean Elections funding and the significant interest the public has in the smooth functioning of an election, one that would be compromised if participating candidates were unable to deliver their message to voters as planned, are sufficient to push the balance of harms in their direction, especially as the election is upon us. This Court will not interfere with the fortuitous currents and eddies of this vital democratic process. Simply, the public interest would not be served by granting an injunction.

CONCLUSION

Plaintiffs have shown a very strong likelihood of success on the merits. However, given the extraordinary balance of the harms required in the context of an ongoing election, Plaintiffs have not met their burden in showing that they are entitled to a preliminary injunction. For this reason, Plaintiffs' Motion was denied.

DATED this 17th day of October, 2008.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John McComish, et al., Plaintiffs, vs. Jan Brewer, et al., Defendants.	No. CV-08-1550-PHX-ROS **ORDER**

Before the Court is Plaintiffs' Motion for a Temporary Restraining Order ("TRO") (Doc. 13). Plaintiffs seek to enjoin enforcement of the matching funds provisions of Arizona's Clean Elections Act, A.R.S. § 16-952 (A), (B) and (C), asserting that these provisions impermissibly burden their First Amendment rights to freedom of speech.

For the reasons below, Plaintiffs' requested relief will be denied.

BACKGROUND

The Arizona Clean Elections Act (the "Act" or "Arizona Act") was approved by Arizona voters in 1998. The Act sets up a voluntary system of campaign financing in which candidates who choose to be "participating candidates" may receive funds from the Citizens Clean Elections Fund ("CCEF"). Participating candidates are limited in the campaign contributions they may receive and personal expenditures they may make. In return, they receive campaign

funds from the CCEF in a set amount.[1] *See* A.R.S. §§ 16-941, -945; *see also*, Citizen [sic] Clean Elections Commission, "Voter Education Guide" (2008) *available at* http://www.ccec.state.az.us/ccecweb/ccecays/ccecPDF.asp?docPath=docs/2008PrimaryCandidateStatementPamphlet.pdf (hereafter "Voter's Guide").

When participating candidates have opponents who are non-participating – "traditional candidates" – they can also receive matching funds. Once a traditional candidate exceeds the spending limit for a given race, her participating opponent or opponents will receive dollar-for-dollar matching funds from the CCEF. These funds cap out at three times the applicable spending limit.[2] Independent expenditures by Political Action Committees ("PACs") made on behalf of a traditional candidate or in opposition to her participating opponent also count towards the spending limit.

---

[1] For candidates for the state legislature, primary spending limits are $12,921 and general election spending limits are $19,382. Legislative candidates may collect up to $3,230 in individual early contributions of no more than $130 during the exploratory and qualifying periods, and may use $610 of personal monies for their campaigns. For candidates for Corporation Commission, the primary spending limit is $82,680 and the general election spending limit, $124,020. Candidates may collect up to $12,920 in early contributions of no more than $130 and contribute $1,230 of their personal monies. *See* A.R.S. § 16-951; Voter's Guide.

[2] The matching funds are a dollar-for-dollar match minus 6% meant to compensate for the fundraising expenses incurred by traditional candidates. A.R.S. § 16-952(A).

Plaintiffs here are non-participating candidates. Plaintiff John McComish is the current Arizona State House of Representatives Majority Whip, currently running for re-election. Plaintiff Nancy McLain is a current member of the Arizona State House of Representatives, currently running for re-election. Plaintiffs Doug Sposito, Frank Antenori, and Tony Bouie are candidates for the Arizona State House of Representatives. Plaintiff Kevin Gibbons is a candidate for the Arizona State Senate. Gibbons, Sposito, and Bouie have recently triggered matching funds to their opposing "participating" candidates by making direct expenditures to their campaign. *See* Gibbons Aff., ¶ 12, Ex. A.1; Bouie Aff., ¶ 9, Ex. B.1; Sposito Aff., ¶ 11, Ex. C.1.. Further, all three report that their campaign expenditures have been chilled because of the possibility of triggering further matching funds to their opponents, making them reluctant to spend money they would otherwise have used to fund campaign activities. *See* Sposito Aff., ¶ 12; Gibbons Aff., ¶ 10-11; Bouie Aff., ¶ 8-10.

The Act's provision can be manipulated in a number of ways. Because PACs may make expenditures on behalf of traditional candidates without their consent or even their knowledge, they may air ineffective – even deliberately ineffective – advertising that then triggers matching funds that participating opponents can use at their discretion. The occurrence of this was alluded to at the hearing for a TRO. Similarly, candidates may use a "slate" strategy against their opponents. Bouie provides an

illustrative example arising out of his district where a traditional incumbent, Representative Sam Crump, and a participating challenger, Carl Seel, running in his district (where two seats are available) have emerged as a "slate," sharing joint advertising. Bouie Aff., ¶ 21-23, Ex. B.2. Thus, money spent by Crump generates matching funds for Seel, effectively aiding both candidates.

ANALYSIS

I. Standard

The standard for issuing a Temporary Restraining Order ("TRO") is the same as that for issuing a preliminary injunction. *Gonzalez v. State*, 435 F. Supp. 2d 997, 999 (D. Ariz. 2006). In the Ninth Circuit, there are two sets of criteria for a court to use when evaluating a request for a TRO. First, a plaintiff must show:

> (1) a strong likelihood of success on the merits,
>
> (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted,
>
> (3) a balance of hardships favoring the plaintiff, and
>
> (4) advancement of the public interest (in certain cases).

Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291 (9th Cir. 2003) (quoting *Johnson v. Cal. State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

Alternately, a plaintiff may "demonstrate[ ] '*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor'" *Id.* These two tests represent a continuum; "[t]hus, the greater the relative hardship to [Plaintiffs] the less probability of success must be shown." *Earth Island*, 351 F.3d at 1298.

II. Application

a. Likelihood of Success on the Merits.

The history of campaign finance jurisprudence is extensive and convoluted. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court rejected a cap on expenditures by candidates of their personal funds. The Court explained that a "candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election," and that a cap on personal expenditures by a candidate constitutes "a substantial," "clea[r]," and "direc[t] restraint on that right." *Id.* at 52. Thus, while states may place certain reasonable limits on campaign *contributions*, personal expenditures may not be restrained. *Id.* at 21-22, 51.

Less clear, however, has been the fate of statutes like Arizona's which, rather than placing a direct cap on personal expenditures, instead create a system that incentivizes – or, perhaps, coerces – candidates to opt into a public financing program that includes limits on contributions *and* personal expenditures.

Several circuits have considered this variation to the statute in *Buckley*. The First, Fourth and Sixth Circuits have ruled such schemes constitutional. In *N.C. Right to Life, Inc. v. Leake*, 524 F.3d 427 (4th Cir. 2008), the court held an act similar to Arizona's was constitutional. "The plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire," wrote the court. "They will not be jailed, fined, or censured if they exceed the trigger amounts." Similarly, the First Circuit, in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), held that Maine's matching fund provision was constitutional, writing that "[t]he public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Id.* at 464; *see also Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (holding that a Kentucky campaign finance law which lifted expenditure limits for participating candidates when non-participating candidates exceeded those limits was constitutional).

Of the circuits that have considered the question, only the Eighth Circuit has found matching fund provisions like those in the Arizona Act to be unconstitutional. In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), a Minnesota law provided that candidates would receive one half the amount of independent expenditures made by opposing candidates. The court emphasized the "'self-censorship' that has occurred

even before the state implements the statute's mandates," "no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship." *Id.* at 1360. The court also found that the speech restriction could not be considered content neutral; "[i]ndependent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's . . . provisions." *Id.* at 1361. There was, however, one substantial difference between the statute at issue in *Day* and the Arizona Act. In Minnesota, the participation rate among candidates was approaching 100% (in Arizona, it is closer to 60%), leading the court to declare that "no interest, no matter how compelling, could be served" by the restrictions on the remaining candidates. *Id.*

For all that these cases have long muddied the matching funds landscape, a recent Supreme Court decision sheds light upon the issue. In *Davis v. Fed. Election Comm'n.*, 128 S. Ct. 2759 (2008), the Court quoted from *Day* extensively and affirmatively, while ignoring the conflicting opinions entirely. *See id.* at 2772. Ultimately, the Court found that provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") – the so-called Millionaire's Amendment – violated the Constitution's First Amendment free speech protections. 2 U.S.C. §441a-1(a); *id.* at 2774. The Millionaire's Amendment was triggered when a non-participating candidate's personal expenditures caused her total campaign expenditures to exceed

$350,000. At that point, an opposing participating candidate was allowed to receive individual contributions at three times the normal limit (the limit for non-participating candidates remained the same), and could accept coordinated party expenditures without limit. *Id.* at 2766. The Court found that the asymmetry of this arrangement "impermissibly burden[ed] [the plaintiff's] First Amendment right to spend his own money for campaign speech." *Id.* at 2771. Thus, although under the BCRA candidates can choose to spend their own money as desired, they "must shoulder a special and potentially significant burden if they make that choice." *Davis*, 128 S.Ct. at 2771.

Because the BCRA "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, the provision [could] not stand unless it [was] 'justified by a compelling state interest.'" *Id.* at 2772. The Court found that the government's stated interest of "level[ing] electoral opportunities for candidates of different personal wealth" was not a compelling state interest. *Id.* at 2773. "[P]reventing corruption or the appearance of corruption" *are* legitimate. *Id.* However, it did not find that the BCRA was justified by such an interest; "reliance on personal funds *reduces* the threat of corruption, and therefore [the challenged provision], by discouraging use of personal funds, disserves the anticorruption interest." *Id.* (emphasis in original).

The law at issue in *Davis* differs from the Arizona Act in that the latter does not inequitably raise the contributions limit, instead providing matching funds from the CCEF. The Defendants point to this in their brief, quoting the Supreme Court's statement that "we have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other. . . ." *Id.* Thus, Defendants argue, "[t]he Act here imposes no asymmetrical burden on a traditional candidate's ability to contribute or expend his or her own money."

However, the *Davis* court focuses not merely on the fact that the contributions limit differs for participating and non-participating candidates, but also forcefully on the fact that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 2772. Likewise, the Supreme Court has held (in a passage quoted approvingly in *Davis*) that, while one does not "have the right to be free from vigorous debate, one "*does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n.*, 475 U.S. 1, 14 (1986) (emphasis in original). The "statutorily imposed choice" provided by the BCRA was not sufficient to save its constitutionality. *Davis*, 128 S. Ct. at 2772. Though the Arizona Act's mechanism for funding differs, the effect, which forces a

candidate to choose to "abide by a limit on personal expenditures" or else endure a burden placed on that right, is substantially the same. *Id.*

It is in the presence of a compelling state interest that the Arizona Act has the potential to most sharply distinguish itself from the BCRA. The Arizona Act perhaps better serves the interest of discouraging corruption; it provides matching funds for – and thus discourages - private contribution. However, as Plaintiffs point out, the Act opens up new avenues for possible corruption. Because matching funds will be provided to participating candidates for expenditures that PACs make on behalf of traditional candidates, PACs can run ineffective, unwished for advertising that generates funds for the participating candidate to use at her discretion. The Act also allows the unofficial "slate" strategy seen in Bouie's race, which allows traditional candidates to trigger matching funds that will be used partially in their own support. The possibility of such gamesmanship mitigates against any decrease in corruption or in the appearance of corruption. The Arizona Act cannot be found to serve this interest any more narrowly than did the BCRA.

Accordingly, Plaintiffs have established that the Matching Funds provision of the Act violates the First Amendment of the U.S. Constitution.

b. Irreparable Injury

Plaintiffs can be said to suffer irreparable injury both through the dispensation of funds that will be used to oppose them and through the mere fact that their speech is being burdened. The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

c. Balance of Harms and the Public Interest

The balance of harms at issue is not a simple one. On the one hand, Plaintiffs suffer a burden on their First Amendment rights and have proffered some evidence that the candidates opposing them benefit directly from that opposition. On the other hand, the State Defendants have a clear interest in running a smooth and orderly election which, in this case, includes a significant number of candidates who have been operating under the assumption that matching funds would be distributed and planning their campaign strategies accordingly. Those disadvantaged candidates are not currently parties to this litigation, but disrupting their expectations of funding shortly before an election surely interferes with the State's interest in holding a fair, contested election. Furthermore, courts have traditionally treated injunctions in election cases differently than in other contexts, as "[i]n this case, hardship falls not only upon the putative defendant" but on all citizens

of the state. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003). Certainly the fair nature of this election has been tainted by the constitutional violations with which it is entwined. However, as Defendants point out, "[c]hanging the rule now would irreparably harm the candidates who in good faith chose to accept public funding by participating in Arizona's Clean Elections program." Defendants provide affidavits from at least two candidates who state that they are relying on matching funds to run an effective campaign. Kelty Aff., ¶ 3-4; Valdez Aff., ¶ 4.

And the length of time Plaintiffs waited to file their TRO also weighs in the balance against the Plaintiffs on the public interest determination. Candidates began qualifying for clean elections funding after January 1, 2008, candidates were required to file nomination papers by June 4, 2008, and *Davis* was decided on June 27, 2008. While it appears Plaintiffs' counsel acted quickly upon learning of the case, the fact remains that Plaintiffs filed their complaint on August 21, 2008 and their Motion for Temporary Restraining Order was filed five days later on August 26, 2008. An Oregon district court decision noted the "eleventh-hour" nature of a challenge in denying a TRO in an election case as bearing against the public interest. *Grudzinski v. Bradbury*, 2007 WL 2733826, at *3 (D. Or. Sept. 12, 2007). Further the case law discussed previously addressing matching funds were not resolved in the context of a TRO or preliminary injunction.

The tardiness of the challenge has inhibited a thorough determination of the harms on each side. In order to accurately assess the balance of the harms, Plaintiffs need to present further evidence of harm done to them through expenditures of matching funds *at this late stage of the election*. Defendants, similarly, need adequate time to develop and present evidence as to the disruptive effect enjoining matching funds will have at this stage of the election.

CONCLUSION

Plaintiffs have shown success on the merits. However, given the special nature of an election and the seriousness of enjoining a critical facet of it at this stage in time, Plaintiffs have not shown that the balance of harms tilts in their favor.

Accordingly,

IT IS ORDERED Plaintiffs' Motion for a Temporary Restraining Order shall be **DENIED.**

IT IS FURTHER ORDERED a hearing will be held on September 3, 2008, 1:30 p.m. to determine whether a preliminary injunction should be granted or, should the parties decide that discovery is necessary, the preliminary injunction hearing will be continued and a status hearing will be held in its place.

DATED this 29th day of August, 2008.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in

any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Citizens Clean Elections Act, A.R.S., Title 16, Chapter 6, Article 2

§16-940 Findings and Declarations.

A. The people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.

B. The people of Arizona find that our current election-financing system:

1. Allows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;

2. Gives incumbents an unhealthy advantage over challengers;

3. Hinders communication to voters by many qualified candidates;

4. Effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests;

5. Undermines public confidence in the integrity of public officials;

6. Costs average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors;

7. Drives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and

8. Requires that elected officials spend too much of their time raising funds rather than representing the public.

§16-941 Limits on Spending and Contributions for Political Campaigns

A. Notwithstanding any law to the contrary, a participating candidate:

1. Shall not accept any contributions, other than a limited number of five-dollar qualifying contributions as specified in section 16-946 and early contributions as specified in section 16-945, except in the emergency situation specified in section 16-954, subsection F.

2. Shall not make expenditures of more than a total of five hundred dollars of the candidate's personal monies for a candidate for the legislature or more than one thousand dollars for a candidate for statewide office.

3. Shall not make expenditures in the primary election period in excess of the adjusted primary election spending limit.

4. Shall not make expenditures in the general election period in excess of the adjusted general election spending limit.

5. Shall comply with section 16-948 regarding campaign accounts and section 16-953 regarding returning unused monies to the citizens clean elections fund described in this article.

B. Notwithstanding any law to the contrary, a nonparticipating candidate:

1. Shall not accept contributions in excess of an amount that is twenty per cent less than the limits specified in section 16-905, subsections A through G, as adjusted by the secretary of state pursuant to section 16-905, subsection J. Any violation of this paragraph shall be subject to the civil penalties and procedures set forth in section 16-905, subsections L through P and section 16-924.

2. Shall comply with section 16-958 regarding reporting, including filing reports with the secretary of state indicating whenever (a) expenditures other than independent expenditures on behalf of the candidate, from the beginning of the election cycle to any date up to primary election day, exceed seventy per cent of the original primary election spending limit applicable to a participating candidate seeking the same office, or (b) contributions to a candidate, from the beginning of the election cycle to any date during the general election period, less expenditures made from the beginning of the

election cycle through primary election day, exceed seventy per cent of the original general election spending limit applicable to a participating candidate seeking the same office. A nonparticipating candidate is exempt from this paragraph if there is no participating candidate running against that nonparticipating candidate.

C. Notwithstanding any law to the contrary, a candidate, whether participating or nonparticipating:

1. If specified in a written agreement signed by the candidate and one or more opposing candidates and filed with the citizens clean elections commission, shall not make any expenditure in the primary or general election period exceeding an agreed-upon amount lower than spending limits otherwise applicable by statute.

2. Shall continue to be bound by all other applicable election and campaign finance statutes and rules, with the exception of those provisions in express or clear conflict with this article.

D. Notwithstanding any law to the contrary, any person who makes independent expenditures related to a particular office cumulatively exceeding five hundred dollars in an election cycle, with the exception of any expenditure listed in section 16-920 and any independent expenditure by an organization arising from a communication directly to the organization's members, shareholders, employees, affiliated persons and

subscribers, shall file reports with the secretary of state in accordance with section 16-958 so indicating, identifying the office and the candidate or group of candidates whose election or defeat is being advocated and stating whether the person is advocating election or advocating defeat.

§16-942 Civil Penalties and Forfeiture of Office.

A. The civil penalty for a violation of any contribution or expenditure limit in section 16-941 by or on behalf of a participating candidate shall be ten times the amount by which the expenditures or contributions exceed the applicable limit.

B. In addition to any other penalties imposed by law, the civil penalty for a violation by or on behalf of any candidate of any reporting requirement imposed by this chapter shall be one hundred dollars per day for candidates for the legislature and three hundred dollars per day for candidates for statewide office. The penalty imposed by this subsection shall be doubled if the amount not reported for a particular election cycle exceeds ten percent of the adjusted primary or general election spending limit. No penalty imposed pursuant to this subsection shall exceed twice the amount of expenditures or contributions not reported. The candidate and the candidate's campaign account shall be jointly and severally responsible for any penalty imposed pursuant to this subsection.

C. Any campaign finance report filed indicating a violation of section 16-941, subsections A or B or section 16-941, subsection C, paragraph 1 involving an amount in excess of ten percent of the sum of the adjusted primary election spending limit and the adjusted general election spending limit for a particular candidate shall result in disqualification of a candidate or forfeiture of office.

D. Any participating candidate adjudged to have committed a knowing violation of section 16-941, subsection A or subsection C, paragraph 1 shall repay from the candidate's personal monies to the fund all monies expended from the candidate's campaign account and shall turn over the candidate's campaign account to the fund.

E. All civil penalties collected pursuant to this article shall be deposited into the fund.

§16-943 Criminal Violations and Penalties.

A. A candidate, or any other person acting on behalf of a candidate, who knowingly violates section 16-941 is guilty of a class 1 misdemeanor.

B. Any person who knowingly pays anything of value or any compensation for a qualifying contribution as defined in section 16-946 is guilty of a class 1 misdemeanor.

C. Any person who knowingly provides false or incomplete information on a report filed under section 16-958 is guilty of a class 1 misdemeanor.

§16-944 Repealed

§16-945 Limits on Early Contributions.

A. A participating candidate may accept early contributions only from individuals and only during the exploratory period and the qualifying period, subject to the following limitations:

1. Notwithstanding any law to the contrary, no contributor shall give, and no participating candidate shall accept, contributions from a contributor exceeding one hundred dollars during an election cycle.

2. Notwithstanding any law to the contrary, early contributions to a participating candidate from all sources for an election cycle shall not exceed, for a candidate for governor, forty thousand dollars or, for other candidates, ten percent of the sum of the original primary election spending limit and the original general election spending limit.

3. Qualifying contributions specified in section 16-946 shall not be included in determining whether the limits in this subsection have been exceeded.

B. Early contributions specified in subsection A of this section and the candidate's personal monies specified in section 16-941, subsection A, paragraph 2 may be spent only during the exploratory period and the qualifying period. Any early contributions not spent by the end of the qualifying period shall be paid to the fund.

C. If a participating candidate has a debt from an election campaign in this state during a previous election cycle in which the candidate was not a participating candidate, then, during the exploratory period only, the candidate may accept, in addition to early contributions specified in subsection A of this section, contributions subject to the limitations in section 16-941, subsection B, paragraph 1, or may exceed the limit on personal monies in section 16-941, subsection A, paragraph 2, provided that such contributions and monies are used solely to retire such debt.

§16-946 Qualifying Contributions.

A. During the qualifying period, a participating candidate may collect qualifying contributions, which shall be paid to the fund.

B. To qualify as a "qualifying contribution," a contribution must be:

1. Made by a qualified elector as defined in section 16-121, who at the time of the contribution is registered in the electoral district of the office the candidate is seeking and who has not given another qualifying contribution to that candidate during that election cycle;

2. Made by a person who is not given anything of value in exchange for the qualifying contribution;

3. In the sum of five dollars, exactly;

4. Received unsolicited during the qualifying period or solicited during the qualifying period by a person who is not employed or retained by the candidate and who is not compensated to collect contributions by the candidate or on behalf of the candidate,

5. If made by check or money order, made payable to the candidate's campaign committee, or if in cash, deposited in the candidate's campaign committee's account; and

6. Accompanied by a three-part reporting slip that includes the printed name, registration address, and signature of the contributor, the name of the candidate for whom the contribution is made, the date, and the printed name and signature of the solicitor.

C. A copy of the reporting slip shall be given as a receipt to the contributor, and another copy shall be retained by the candidate's campaign committee. Delivery of an original reporting slip to the secretary of state shall excuse the candidate from disclosure of these contributions on campaign finance reports filed under article 1 of this chapter.

§16-947 Certification as a participating candidate.

A. A candidate who wishes to be certified as a participating candidate shall, before the end of the qualifying period, file an application with the secretary of state, in a form specified by the citizens clean elections commission.

B. The application shall identify the candidate, the office that the candidate plans to seek, and the candidate's party, if any, and shall contain the candidate's signature, under oath, certifying that:

1. The candidate has complied with the restrictions of section 16-941, subsection A during the election cycle to date.

2. The candidate's campaign committee and exploratory committee have filed all campaign finance reports required under article 1 of this chapter during the election cycle to date and that they are complete and accurate.

3. The candidate will comply with the requirements of section 16-941, subsection A during the remainder of the election cycle and, specifically, will not accept private contributions.

C. The commission shall act on the application within one week. Unless, within that time, the commission denies an application and provides written reasons that all or part of a certification in subsection B of this section is incomplete or untrue, the candidate shall be certified as a participating candidate. If the commission denies an application for failure to file all complete and accurate campaign finance reports or failure to make the certification in subsection B, paragraph 3 of this section, the candidate may reapply within two weeks of the commission's decision by filing complete and accurate campaign finance reports and another sworn certification.

§16-948 Controls on Participating Candidates' Campaign Accounts.

A. A participating candidate shall conduct all financial activity through a single campaign account of the candidate's campaign committee. A participating candidate shall not make any deposits into the campaign account other than those permitted under sections 16-945 or 16-946.

B. A candidate may designate other persons with authority to withdraw funds from the candidate's campaign account. The candidate and any person so designated shall sign a joint statement under oath promising to comply with the requirements of this title.

C. The candidate or a person authorized under subsection B of this section shall pay monies from a participating candidate's campaign account directly to the person providing goods or services to the campaign and shall identify, on a report filed pursuant to article 1 of this chapter, the full name and street address of the person and the nature of the goods and services and compensation for which payment has been made. Notwithstanding the previous sentence, a campaign committee may establish one or more petty cash accounts, which in aggregate shall not exceed one thousand dollars at any time. No single expenditure shall be made from a petty cash account exceeding one hundred dollars.

D. Monies in a participating candidate's campaign account shall not be used to pay fines or civil penalties, for costs or legal fees related to representation before the commission, or for defense of

any enforcement action under this chapter. Nothing in this subsection shall prevent a participating candidate from having a legal defense fund.

§16-949 Caps on Spending From Citizens Clean Elections Fund

A. The commission shall not spend, on all costs incurred under this article during a particular calendar year, more than five dollars times the number of Arizona resident personal income tax returns filed during the previous calendar year. Tax reductions and tax credits awarded to taxpayers pursuant to section 16-954, subsections A and B shall not be considered costs incurred under this article for purposes of this section. The commission may exceed this limit during a calendar year, provided that it is offset by an equal reduction of the limit during another calendar year during the same four-year period beginning January 1 immediately after a gubernatorial election.

B. The commission may use up to ten percent of the amount specified in subsection A of this section for reasonable and necessary expenses of administration and enforcement, including the activities specified in section 16-956, subsection A, paragraphs 3 through 7 and subsections B and C. Any portion of the ten percent not used for this purpose shall remain in the fund.

C. The commission shall apply ten percent of the amount specified in subsection A of this section for reasonable and necessary expenses associated

with voter education, including the activities specified in section 16-956, subsection A.

D. The state treasurer shall administer a citizens clean election fund from which costs incurred under this article shall be paid. The auditor general shall review the monies in, payments into, and expenditures from the fund no less often than every four years.

§16-950 Qualification for Clean Campaign Funding

A. A candidate who has made an application for certification may also apply, in accordance with subsection B of this section, to receive funds from the citizens clean elections fund, instead of receiving private contributions.

B. To receive any clean campaign funding, the candidate must present to the secretary of state no later than one week after the end of the qualifying period a list of names of persons who have made qualifying contributions pursuant to section 16-946 on behalf of the candidate. The list shall be divided by county. At the same time, the candidate must tender to the secretary of state the original reporting slips identified in section 16-946, subsection C for persons on the list and an amount equal to the sum of the qualifying contributions collected. The secretary of state shall deposit the amount into the fund.

C. The secretary of state shall select at random a sample of five per cent of the number of non-duplicative names on the list and forward

facsimiles of the selected reporting slips to the county recorders for the counties of the addresses specified in the selected slips. Within ten days, the county recorders shall provide a report to the secretary of state identifying as disqualified any slips that are unsigned or undated or that the recorder is unable to verify as matching a person who is registered to vote in the electoral district of the office the candidate is seeking on the date specified on the slip. The secretary of state shall multiply the number of slips not disqualified by twenty, and if the result is greater than one hundred ten per cent of the quantity required, shall approve the candidate for funds, and if the result is less than one hundred ten per cent of the quantity required, the secretary of state shall forward facsimiles of all of the slips to the county recorders for verification, and the county recorders shall check all slips in accordance with the process above. A county recorder shall not check slips already verified. A county recorder shall report verified totals daily to the secretary of state until a determination is made that a sufficient number of verified slips has been submitted. If a sufficient number of verified slips has been submitted to one or more county recorders, the county recorders may stop the verification process.

D. To qualify for clean campaign funding, a candidate must have been approved as a participating candidate pursuant to section 16-947 and have obtained the following number of qualifying contributions:

1. For a candidate for legislature, two hundred.

2. For candidate for mine inspector, five hundred.

3. For a candidate for treasurer, superintendent of public instruction, or corporation commission, one thousand five hundred.

4. For a candidate for Secretary of State or attorney general, two thousand five hundred.

5. For a candidate for governor, four thousand.

E. To qualify for clean campaign funding, a candidate must have met the requirements of this section and either be an independent candidate or meet the following standards:

1. To qualify for funding for a party primary election, a candidate must have properly filed nominating papers and nominating petitions with signatures pursuant to chapter 3, articles 2 and 3 of this title in the primary of a political organization entitled to continued representation on the official ballot in accordance with section 16-804.

2. To qualify for clean campaign funding for a general election, a candidate must be a party nominee of such a political organization.

§16-951 Clean Campaign Funding.

A. At the beginning of the primary election period, the commission shall pay from the fund to the campaign account of each candidate who qualifies for clean campaign funding:

1. For a candidate who qualifies for clean campaign funding for a party primary election, an amount equal to the original primary election spending limit;

2. For an independent candidate who qualifies for clean campaign funding, an amount equal to seventy percent of the sum of the original primary election spending limit and the original general election spending limit; or

3. For a qualified participating candidate who is unopposed for an office in that candidate's primary, in the primary of any other party, and by any opposing independent candidate, an amount equal to five dollars times the number of qualifying contributions for that candidate certified by the commission.

B. At any time after the first day of January of an election year, any candidate who has met the requirements of section 16-950 may sign and cause to be filed a nomination paper in the form specified by section 16-311, subsection A, with a nominating petition and signatures, instead of filing such papers after the earliest time set for filing specified by that subsection. Upon such filing and verification of the signatures, the commission shall pay the amount specified in subsection A of this section immediately, rather than waiting for the beginning of the primary election period.

C. At the beginning of the general election period, the commission shall pay from the fund to the campaign account of each candidate who qualifies for clean campaign funding for the general

election, except those candidates identified in subsection A, paragraphs 2 or 3 or subsection D of this section, an amount equal to the original general election spending limit.

D. At the beginning of the general election period, the commission shall pay from the fund to the campaign account of a qualified participating candidate who has not received funds pursuant to subsection A, paragraph 3 of this section and who is unopposed by any other party nominee or any opposing independent candidate an amount equal to five dollars times the number of qualifying contributions for that candidate certified by the commission.

E. The special original general election spending limit, for a candidate who has received funds pursuant to subsection A, paragraphs 2 or 3 or subsection D of this section, shall be equal to the amount that the commission is obligated to pay to that candidate.

§16-952 Equal Funding of Candidates

A. Whenever during a primary election period a report is filed, or other information comes to the attention of the commission, indicating that a nonparticipating candidate who is not unopposed in that primary has made expenditures during the election cycle to date exceeding the original primary election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate in the same party primary as the nonparticipating

candidate an amount equal to any excess of the reported amount over the primary election spending limit as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses and less the amount of early contributions raised for that participating candidate for that office as prescribed by section 16-945. The primary election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

B. Whenever during a general election period a report has been filed, or other information comes to the attention of the commission, indicating that the amount a nonparticipating candidate who is not unopposed has received in contributions during the election cycle to date less the amount of expenditures the nonparticipating candidate made through the end of the primary election period exceeds the original general election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate qualified for the ballot and seeking the same office as the nonparticipating candidate an amount equal to any excess of the reported difference over the general election spending limit, as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses. The general election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

C. For the purposes of subsections A and B of this section, the following expenditures reported pursuant to this article shall be treated as follows:

1. Independent expenditures against a participating candidate shall be treated as expenditures of each opposing candidate, for the purpose of subsection A of this section, or contributions to each opposing candidate, for the purpose of subsection B of this section.

2. Independent expenditures in favor of one or more nonparticipating opponents of a participating candidate shall be treated as expenditures of those nonparticipating candidates, for the purpose of subsection A of this section, or contributions to those nonparticipating candidates, for the purpose of subsection B of this section.

3. Independent expenditures in favor of a participating candidate shall be treated, for every opposing participating candidate, as though the independent expenditures were an expenditure of a nonparticipating opponent, for the purpose of subsection A of this section, or a contribution to a nonparticipating opponent, for the purpose of subsection B of this section.

4. Expenditures made during the primary election period by or on behalf of an independent candidate or a nonparticipating candidate who is unopposed in a party primary shall be deducted from the total amount of monies raised for purposes of determining the amount of equalizing funds, up to the

amount of primary funds received by the participating candidate. Equalizing funds pursuant to subsection B of this section shall then be calculated and paid at the start of the general election period.

5. Expenditures made before the general election period that consist of a contract, promise or agreement to make an expenditure during the general election period resulting in an extension of credit shall be treated as though made during the general election period, and equalizing funds pursuant to subsection B of this section shall be paid at the start of the general election period.

6. Expenditures for or against a participating candidate promoting or opposing more than one candidate who is not running for the same office shall be allocated by the commission among candidates for different offices based on the relative size or length and relative prominence of the reference to candidates for different offices.

D. Upon applying for citizen funding pursuant to section 16-950, a participating candidate for the legislature in a one-party-dominant legislative district who is qualified for clean campaign funding for the party primary election of the dominant party may choose to reallocate a portion of funds from the general election period to the primary election period. At the beginning of the primary election period, the commission shall pay from the fund to the campaign account of a participating candidate who makes this choice an

extra amount equal to fifty per cent of the original primary election spending limit, and the original primary election spending limit for the candidate who makes this choice shall be increased by the extra amount. For a primary election in which one or more participating candidates have made this choice, funds shall be paid under subsections A and B of this section only to the extent of any excess over the original primary election spending limit as so increased. If a participating candidate who makes this choice becomes qualified for clean campaign funding for the general election, the amount the candidate receives at the beginning of the general election period shall be reduced by the extra amount received at the beginning of the primary election period, and the original general election spending limit for that candidate shall be reduced by the extra amount. For a general election in which a participating candidate has made this choice, funds shall be paid under subsections A and B of this section only to the extent of any excess over the original general election spending limit, without such reduction, unless the candidate who has made this choice is the only participating candidate in the general election, in which case such funds shall be paid to the extent of excess over the original general election spending limit with such reduction. For the purpose of this subsection, A one-party-dominant legislative district is a district in which the number of registered voters registered in the party with the highest number of registered voters exceeds the number of registered voters registered to each of the other parties by an amount at least as high

as ten per cent of the total number of voters registered in the district. The status of a district as a one-party-dominant legislative district shall be determined as of the beginning of the qualifying period.

E. If an adjusted spending limit reaches three times the original spending limit for a particular election, the commission shall not pay any further amounts from the fund to the campaign account of any participating candidate, and the spending limit shall not be adjusted further.

16-953. Return of monies to the citizens clean elections fund

A. At the end of the primary election period, a participating candidate who has received monies pursuant to section 16-951, subsection A, paragraph 1 shall return to the fund all monies in the candidate's campaign account above an amount sufficient to pay any unpaid bills for expenditures made during the primary election period and for goods or services directed to the primary election.

B. At the end of the general election period, a participating candidate shall return to the fund all monies in the candidate's campaign account above an amount sufficient to pay any unpaid bills for expenditures made before the general election and for goods or services directed to the general election.

C. A participating candidate shall pay all uncontested and unpaid bills referenced in this section

no later than thirty days after the primary or general election. A participating candidate shall make monthly reports to the commission concerning the status of the dispute over any contested bills. Any monies in a candidate's campaign account after payment of bills shall be returned promptly to the fund.

D. If a participating candidate is replaced pursuant to section 16-343, and the replacement candidate files an oath with the secretary of state certifying to section 16-947, subsection B, paragraph 3, the campaign account of the participating candidate shall be transferred to the replacement candidate and the commission shall certify the replacement candidate as a participating candidate without requiring compliance with section 16-950 or the remainder of section 16-947. If the replacement candidate does not file such an oath, the campaign account shall be liquidated and all remaining monies returned to the fund.

E. If a participating candidate who has received monies pursuant to section 16-951, subsection A, paragraph 1 does not qualify for the ballot for the primary election, the participating candidate shall:

1. Return to the fund all monies in the candidate's campaign account above the amount sufficient to pay any unpaid bills for expenditures made before the date the candidate failed to qualify for the primary ballot.

2. Return to the commission, within fourteen days, all remaining assets purchased with

public funds in that election cycle, including all political signs. The disqualified participating candidate is not required to return political signs purchased in a previous election cycle.

3. Repay any monies paid to a family member unless the participating candidate demonstrates that the payment made was for goods or services actually provided before disqualification of the candidate and the payment was for fair market value. For the purposes of this paragraph, "family member" means a parent, grandparent, spouse, child or sibling of the candidate or a parent or spouse of any of those persons.

§16-954 Clean Elections Tax Reduction; Return of Excess Monies.

A. For tax years beginning on or after January 1, 1998, a taxpayer who files on a state income tax return form may designate a five-dollar voluntary contribution per taxpayer to the fund by marking an optional check-off box on the first page of the form. A taxpayer who checks this box shall receive a five-dollar reduction in the amount of tax, and five dollars from the amount of taxes paid shall be transferred by the department of revenue to the fund. The department of revenue shall provide check-off boxes, identified as the clean elections fund tax reduction, on the first page of income tax return forms, for designations pursuant to this subsection.

B. Any taxpayer may make a voluntary donation to the fund by designating the fund on an income tax return form filed by the individual or business entity or by making a payment directly to the fund. Any taxpayer making a donation pursuant to this subsection shall receive a dollar-for-dollar tax credit not to exceed twenty percent of the tax amount on the return or five hundred dollars per taxpayer, whichever is higher. Donations made pursuant to this section are otherwise not tax deductible and cannot be designated as for the benefit of a particular candidate, political party, or election contest. The department of revenue shall transfer to the fund all donations made pursuant to this subsection. The department of revenue shall provide a space, identified as the clean elections fund tax credit, on the first page of income tax return forms, for donations pursuant to this subsection.

C. Beginning January 1, 1999, an additional surcharge of ten percent shall be imposed on all civil and criminal fines and penalties collected pursuant to section 12-116.01 and shall be deposited into the fund.

D. At least once per year, the commission shall project the amount of monies that the fund will collect over the next four years and the time such monies shall become available. Whenever the commission determines that the fund contains more monies than the commission determines that it requires to meet current debts plus expected expenses, under the assumption that expected expenses will be at the expenditure limit in section 16-949, subsection A, and taking

into account the projections of collections, the commission shall designate such monies as excess monies and so notify the state treasurer, who shall thereupon return the excess monies to the general fund.

E. At least once per year, the commission shall project the amount of citizen funding for which all candidates will have qualified pursuant to this article for the following calendar year. By the end of each year, the commission shall announce whether the amount that the commission plans to spend the following year pursuant to section 16-949, subsection A exceeds the projected amount of citizen funding. If the commission determines that the fund contains insufficient monies or the spending cap would be exceeded were all candidate's accounts to be fully funded, then the commission may include in the announcement specifications for decreases in the following parameters, based on the commission's projections of collections and expenses for the fund, made in the following order:

1. First, the commission may announce a decrease in the matching cap under section 16-952, subsection E from three times to an amount between three and one times.

2. Next, the commission may announce that the fund will provide equalization monies under section 16-952, subsections A and B as a fraction of the amounts there specified.

3. Finally, the commission may announce that the fund will provide monies under section

16-951 as a fraction of the amounts there specified.

F. If the commission cannot provide participating candidates with all monies specified under sections 16-951 and 16-952, as decreased by any announcement pursuant to subsection E of this section, then the commission shall allocate any reductions in payments proportionately among candidates entitled to monies and shall declare an emergency. Upon declaration of an emergency, a participating candidate may accept private contributions to bring the total monies received by the candidate from the fund and from such private contributions up to the adjusted spending limits, as decreased by any announcement made pursuant to subsection E of this section.

§16-955 Citizens Clean Election Commission; Structure

A. The citizens clean elections commission is established consisting of five members. No more than two members of the commission shall be members of the same political party. No more than two members of the commission shall be residents of the same county. No one shall be appointed as a member who does not have a registration pursuant to chapter 1 of this title that has been continuously recorded for at least five years immediately preceding appointment with the same political party or as an independent.

B. The candidates for vacant commissioner positions shall be persons who are committed to enforcing this article in an honest, independent and

impartial fashion and to seeking to uphold public confidence in the integrity of the electoral system. Each candidate shall be a qualified elector who has not, in the previous five years in this state, been appointed to, been elected to or run for any public office, including precinct committeeman, or served as an officer of a political party.

C. Initially, the commission on appellate court appointments shall nominate five slates, each having three candidates, before January 1, 1999. No later than February 1, 1999, the governor shall select one candidate from one of the slates to serve on the commission for a term ending January 31, 2004. Next, the highest-ranking official holding a statewide office who is not a member of the same political party as the governor shall select one candidate from another one of the slates to serve on the commission for a term ending January 31, 2003. Next, the second-highest-ranking official holding a statewide office who is a member of the same political party as the governor shall select one candidate from one of the three remaining slates to serve on the commission for a term ending January 31, 2002. Next, the second-highest-ranking official holding a statewide office who is not a member of the same political party as the governor shall select one candidate from one of the two remaining slates to serve on the commission for a term ending January 31, 2001. Finally, the third-highest-ranking official holding a statewide office who is a member of the same political party as the governor shall elect one candidate from the last slate to serve on the commission for a term

ending January 31, 2000. For the purposes of this section, the ranking of officials holding statewide office shall be governor, secretary of state, attorney general, treasurer, superintendent of public instruction, corporation commissioners in order of seniority, mine inspector, senate majority and minority leaders and house majority and minority leaders.

D. One commissioner shall be appointed for a five-year term beginning February 1 of every year beginning with the year 2000. Before February 1 of each year beginning in the year 2000, the governor and the highest-ranking official holding a statewide office who is not a member of the same political party as the governor shall alternate filling such vacancies. The vacancy in the year 2000 shall be filled by the governor.

E. Members of the commission may be removed by the governor, with concurrence of the senate, for substantial neglect of duty, gross misconduct in office, inability to discharge the powers and duties of office or violation of this section, after written notice and opportunity for a response.

F. If a commissioner does not complete the commissioner's term of office for any reason, a replacement shall be selected within thirty days after the vacancy occurs. The highest-ranking official holding a statewide office who is a member of the political party of the official who nominated the commissioner who vacated office shall nominate the replacement, who shall serve as commissioner for the unexpired portion of the term. A vacancy or vacancies shall not impair the

right of the remaining members to exercise all of the powers of the board.

G. Commissioners are eligible to receive compensation in an amount of two hundred dollars for each day on which the commission meets and reimbursement of expenses pursuant to title 38, chapter 4, article 2.

H. The commissioners shall elect a chair to serve for each calendar-year period from among their members whose terms expire after the conclusion of that year. Three commissioners shall constitute a quorum.

I. A member of the commission shall serve no more than one term and is not eligible for reappointment. No commissioner, during the commissioner's tenure or for three years thereafter, shall seek or hold any other public office, serve as an officer of any political committee or employ or be employed as a lobbyist.

J. The commission shall appoint an executive director who shall not be a member of the commission and who shall serve at the pleasure of the commission. The executive director is eligible to receive compensation set by the board within the range determined under section 38-611. The executive director, subject to title 41, chapter 4, articles 5 and 6, shall employ, determine the conditions of employment and specify the duties of administrative, secretarial and clerical employees as the director deems necessary.

§16-956 Voter Education and Enforcement Duties

A. The commission shall:

1. Develop a procedure for publishing a document or section of a document having a space of predefined size for a message chosen by each candidate. For the document that is mailed before the primary election, the document shall contain the names of every candidate for every statewide and legislative district office in that primary election without regard to whether the candidate is a participating candidate or a nonparticipating candidate. For the document that is mailed before the general election, the document shall contain the names of every candidate for every statewide and legislative district office in that general election without regard to whether the candidate is a participating candidate or a nonparticipating candidate. The commission shall mail one copy of each document to every household that contains a registered voter. For the document that is mailed before the primary election, the mailing may be made over a period of days but shall be mailed in order to be delivered to households before the earliest date for receipt by registered voters of any requested early ballots for the primary election. The commission may mail the second document over a period of days but shall mail the second document in order to be delivered to households before the earliest date for receipt by registered voters of any requested

early ballots for the general election. The primary election and general election documents published by the commission shall comply with all of the following:

(a) For any candidate who does not submit a message pursuant to this paragraph, the document shall include with the candidate's listing the words "no statement submitted".

(b) The document shall have printed on its cover the words "citizens clean elections commission voter education guide" and the words "primary election" or "general election" and the applicable year. The document shall also contain at or near the bottom of the document cover in type that is no larger than one-half the size of the type used for "citizens clean elections commission voter education guide" the words "paid for by the citizens clean elections fund".

(c) In order to prevent voter confusion, the document shall be easily distinguishable from the publicity pamphlet that is required to be produced by the secretary of state pursuant to section 19-123.

2. Sponsor debates among candidates, in such manner as determined by the commission. The commission shall require participating candidates to attend and participate in debates and may specify by rule penalties for nonparticipation. The commission shall

invite and permit nonparticipating candidates to participate in debates.

3. Prescribe forms for reports, statements, notices and other documents required by this article. The commission shall not require a candidate to use a reporting system other than the reporting system jointly approved by the commission and the office of the secretary of state.

4. Prepare and publish instructions setting forth methods of bookkeeping and preservation of records to facilitate compliance with this article and explaining the duties of persons and committees under this article.

5. Produce a yearly report describing the commission's activities and any recommendations for changes of law, administration or funding amounts and accounting for monies in the fund.

6. Adopt rules to implement the reporting requirements of section 16-958, subsections D and E.

7. Enforce this article, ensure that money from the fund is placed in candidate campaign accounts or otherwise spent as specified in this article and not otherwise, monitor reports filed pursuant to this chapter and financial records of candidates as needed to ensure that equalization monies are paid promptly to opposing qualified candidates under section 16-952 and ensure that money required by this article to be paid to the fund

is deposited in the fund. The commission shall not take action on any external complaint that is filed more than ninety days after the postelection report is filed or ninety days after the completion of the canvass of the election to which the complaint relates, whichever is later.

B. The commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the commission's duties or the exercise of its powers.

C. The commission may adopt rules to carry out the purposes of this article and to govern procedures of the commission. Commission rule making is exempt from title 41, chapter 6, article 3. The commission shall propose and adopt rules in public meetings, with at least sixty days allowed for interested parties to comment after the rules are proposed. The commission shall also file a notice of exempt rule making and the proposed rule in the format prescribed in section 41-1022 with the secretary of state's office for publication in the Arizona administrative register. After consideration of the comments received in the sixty day comment period, the commission may adopt the rule in an open meeting. Any rules given final approval in an open meeting shall be filed in the format prescribed in section 41-1022 with the secretary of state's office for publication in the Arizona administrative register. Any rules

adopted by the commission shall only be applied prospectively from the date the rule was adopted.

D. Beginning January 1, 2010, rules adopted by the commission are not effective until January 1 in the year following the adoption of the rule, except that rules adopted by unanimous vote of the commission may be made immediately effective and enforceable.

E. If, in the view of the commission, the action of a particular candidate or committee requires immediate change to a commission rule, a unanimous vote of the commission is required. Any rule change made pursuant to this subsection that is enacted with less than a unanimous vote takes effect for the next election cycle.

F. Based on the results of the elections in the year 2002 or any quadrennial election thereafter, and within six months after such election, the commission may adopt rules changing the number of qualifying contributions required for any office from those listed in section 16-950, subsection D, by no more than twenty per cent of the number applicable for the preceding election.

§16-957 Enforcement Procedure

A. If the commission finds that there is reason to believe that a person has violated any provision of this article, the commission shall serve on that person an order stating with reasonable particularity the nature of the violation and requiring compliance within fourteen days. During that period, the alleged violator may provide any

explanation to the commission, comply with the order, or enter into a public administrative settlement with the commission.

B. Upon expiration of the fourteen days, if the commission finds that the alleged violator remains out of compliance, the commission shall make a public finding to that effect and issue an order assessing a civil penalty in accordance with section 16-942, unless the commission publishes findings of fact and conclusions of law expressing good cause for reducing or excusing the penalty. The violator has fourteen days from the date of issuance of the order assessing the penalty to appeal to the superior court as provided in title 12, chapter 7, article 6.

C. Any candidate in a particular election contest who believes that any opposing candidate has violated this article for that election may file a complaint with the commission requesting that action be taken pursuant to this section. If the commission fails to make a finding under subsection A of this section within thirty days after the filing of such a complaint, the candidate may bring a civil action in the superior court to impose the civil penalties prescribed in this section.

§16-958 Manner of Filing Reports

A. Any person who has previously reached the dollar amount specified in section 16-941, subsection D for filing an original report shall file a supplemental report each time previously unreported independent expenditures specified

by that subsection exceeds one thousand dollars. Any person who has previously reached the dollar amounts specified in section 16-941, subsection B, paragraph 2 for filing an original report shall file a supplemental report to declare that previously unreported expenditures or contributions specified by that paragraph exceed ten per cent of the original primary election spending limit or twenty-five thousand dollars, whichever is lower, before the general election period, or ten per cent of the original general election spending limit or twenty-five thousand dollars, whichever is lower, during the general election period. Such reports shall be filed at the times specified in subsection B of this section and shall identify the dollar amount being reported, the candidate and the date and no other detail is required in reports made pursuant to this section.

B. Any person who must file an original report pursuant to section 16-941, subsection B, paragraph 2 or subsection D or who must file a supplemental report for previously unreported amounts pursuant to subsection A of this section shall file as follows:

1. Before the beginning of the primary election period, the person shall file a report on the first of each month, unless the person has not reached the dollar amount for filing an original or supplemental report on that date.

2. Thereafter, except as stated in paragraph 3 of this subsection, the person shall file a report on any Tuesday by which the person

has reached the dollar amount for filing an original or supplemental report.

3. During the last two weeks before the primary election and the last two weeks before the general election, the person shall file a report within one business day of reaching the dollar amount for filing an original or supplemental report.

C. Any filing under this article on behalf of a candidate may be made by the candidate's campaign committee. All candidates shall deposit any check received by and intended for the campaign and made payable to the candidate or the candidate's campaign committee, and all cash received by and intended for the campaign, in the candidate's campaign account before the due date of the next report specified in subsection B of this section. No candidate or person acting on behalf of a candidate shall conspire with a donor to postpone delivery of a donation to the campaign for the purpose of postponing the reporting of the donation in any subsequent report.

D. The secretary of state shall immediately notify the commission of the filing of each report under this section and deliver a copy of the report to the commission, and the commission shall promptly mail or otherwise deliver a copy of each report filed pursuant to this section to all participating candidates opposing the candidate identified in section 16-941, subsection B, paragraph 2 or subsection D.

E. Any report filed pursuant to this section or section 16-916, subsection A, paragraph 1 or

subsection B shall be filed in electronic format. The secretary of state shall distribute computer software to political committees to accommodate such electronic filing.

F. During the primary election period and the general election period, all candidates shall make available for public inspection all bank accounts, campaign finance reports and financial records relating to the candidate's campaign, either by immediate disclosure through electronic means or at the candidate's campaign headquarters, in accordance with rules adopted by the commission.

§16-959 Inflationary and Other Adjustments of Dollar Values

A. Every two years, the secretary of state shall modify the dollar values specified in the following parts of this article, in the manner specified by section 16-905, subsection J, to account for inflation: section 16-941, subsection A, paragraph 2 or subsection D; section 16-942, subsection B; section 16-945, subsection A, paragraphs 1 and 2; section 16-948, subsection C; section 16-954, subsection B; section 16-955, subsection G; and section 16-961, subsections G and H. In addition, the secretary of state shall make a similar inflation adjustment by modifying the dollar values in section 16-949, subsection A and section 16-954, subsection A to the nearest dollar. In addition, every two years, the secretary of state shall change the dollar values in section 16-961, subsections G and H in proportion to the change

in the number of Arizona resident personal income tax returns filed during the previous calendar year.

B. Based on the results of the elections in the year 2002 or any quadrennial election thereafter, and within six months after such election, the commission may adopt rules in a public meeting reallocating funds available to all candidates between the primary and general elections by selecting a fraction for primary election spending limits that is between one third and one half of the spending limits for the election as a whole. For each office, the primary election spending limit shall be modified to be the sum of the primary and general spending limits times the selected fraction, and the general election spending limit shall be modified to be the same sum times one less the selected fraction.

§16-960 Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. In any court challenge to the validity of this article, the commission and Arizonans for clean elections shall have standing to intervene.

§16-961 Definitions

A. The terms "candidate's campaign committee," "contribution," "expenditures," "exploratory committee," "independent expenditure," "personal monies," "political committee" and "statewide office" are defined in section 16-901.

B. 1. "Election cycle" means the period between successive general elections for a particular office.

2. "Exploratory period" means the period beginning on the day after a general election and ending the day before the start of the qualifying period.

3. "Qualifying period" means the period beginning on the first day of August in a year preceding an election, for an election for a statewide office, or on the first day of January of an election year, for an election for legislator, and ending seventy-five days before the day of the general election.

4. "Primary election period" means the nine-week period ending on the day of the primary election.

5. "General election period" means the period beginning on the day after the primary election and ending on the day of the general election.

6. For any recall election, the qualifying period shall begin when the election is called and last for thirty days, there shall be no primary election period and the general election period shall extend from the day after the end of the qualifying period to the day of the recall election. For recall elections, any reference to "general

election" in this article shall be treated as if referring to the recall election.

C. 1. "Participating candidate" means a candidate who becomes certified as a participating candidate pursuant to section 16-947.

2. "Nonparticipating candidate" means a candidate who does not become certified as a participating candidate pursuant to section 16-947.

3. Any limitation of this article that is applicable to a participating candidate or a nonparticipating candidate shall also apply to that candidate's campaign committee or exploratory committee.

D. "Commission" means the citizens clean elections commission established pursuant to section 16-955.

E. "Fund" means the citizens clean elections fund defined by this article.

F. 1. "Party nominee" means a person who has been nominated by a political party pursuant to section 16-301 or 16-343.

2. "Independent candidate" means a candidate who has properly filed nominating papers and nominating petitions with signatures pursuant to section 16-341.

3. "Unopposed" means with reference to an election for:

(a) A member of the house of representatives, opposed by no more than one other candidate who has qualified for the ballot and who is running in the same district.

(b) A member of the corporation commission, opposed by a number of candidates who have qualified for the ballot that is fewer than the number of corporation commission seats open at that election and for which the term of office ends on the same date.

(c) All other offices, opposed by no other candidate who has qualified for the ballot and who is running in that district or running for that same office and term.

G. "Primary election spending limits" means:

1. For a candidate for the legislature, twelve thousand nine hundred twenty-one dollars.

2. For a candidate for mine inspector, forty-one thousand three hundred forty-nine dollars.

3. For a candidate for treasurer, superintendent of public instruction or the corporation commission, eighty-two thousand six hundred eighty dollars.

4. For a candidate for secretary of state or attorney general, one hundred sixty-five thousand three hundred seventy-eight dollars.

5. For a candidate for governor, six hundred thirty-eight thousand two hundred twenty-two dollars.

H. "General election spending limits" means amounts fifty per cent greater than the amounts specified in subsection G of this section.

I. 1. "Original" spending limit means a limit specified in subsections G and H of this section, as adjusted pursuant to section 16-959, or a

special amount expressly set for a particular candidate by a provision of this title.

2. "Adjusted" spending limit means an original spending limit as further adjusted to account for reported overages pursuant to section 16-952.

THE STATE OF ARIZONA
CITIZENS CLEAN ELECTIONS COMMISSION

REPORTER'S TRANSCRIPT OF PUBLIC MEETING

Phoenix, Arizona
June 9, 2010
2:00 p.m.

Reported By:

Angela Furniss Miller, RPR
Certified Reporter (AZ 50127)

Miller Certified Reporting

[2] A PUBLIC MEETING, BEFORE THE CITIZENS CLEAN ELECTIONS COMMISSION, convened at 2:00 p.m. on June 9, 2010, at the State of Arizona, Clean Elections Commission, 1616 W. Adams, Conference Room, Phoenix, Arizona, in the presence of the following board members:

Ms. Royann Parker, Chairperson
Mr. Gary Scaramazzo
Ms. Lori Daniels (Telephonic)
Mr. Louis Hoffman
Mr. Jeff Fairman

OTHERS PRESENT:

Todd Lang, Executive Director
Colleen McGee, Deputy Director
Paula Thomas, Executive Assistant
Terah Kenney, Executive Support Specialist
Michael Becker, Voter Education Manager
Daniel Ruiz, II, Campaign Finance Manager
Jim Barton, Attorney General Office

Mary O'Grady, Attorney General Office
Michael Brewer, Citizen
Lorna Romero, AZ Chamber of Commerce
Garrick Taylor, AZ Chamber of Commerce
Dennis Welch, AZ Guardian
David Cantelme, Cantelme & Brown, PLC
Aaron Brown, Cantelme & Brown, PLC
Paul Avelar, Institute for Justice
Diana Simpson, Institute for Justice
Tony Bouie, Candidate/Plaintiff
Paul Bente, Governor Jan Brewer 2010
Douglas Cole, Governor Jan Brewer 2010
Rhonda Barnes, Perkins, Cole, Brown & Bain
Lisa Hauser, Gammage & Burnham
Linda Brown, AZ Advocacy Network
Camilla, Citizen
James Roberts, Citizen
Jeremy Duda, AZ Capital Times
Josh Coddington, AZ Capital Times
Nick Dranias, Goldwater Institute
Eric Ehst, Citizen
Sarah Serger, Citizen
Nancy Read, Secretary of State's Office
Gilberto Zaragoza, Vince Rabago for AG
David Stevens, State Representative (Telephonic)

* * *

[36] COMMISSIONER HOFFMAN: I have a comment if . . .

CHAIRPERSON PARKER: Okay.

COMMISSIONER HOFFMAN: As many of you may know, I was the one who drafted the

legislative language that became the initiative which became the Clean Elections Act. So I am to blame for the 954(F) and any other provisions that have been spoken about.

In my opinion, the – the – 954(F) was intended to apply for any circumstance in which the Commission was unable to pay the money specified under 951 and 952, and I don't believe that it was intended to be limited by (A) – by (E). And were it not for the Court's order – or, the wording of the Court's injunction, more specifically, I personally would be voting to declare an emergency.

However, to – to declare an emergency the – we would have to reach the conclusion that there was monies that was authorized under the matching funds statute, 952, that we couldn't pay. And the Court's order tells us that 952 may not be applied, in so many words; and, therefore, I believe that were barred by the Court's stay from acting as the Act was written and as the Act was intended. I believe Ms. Hauser is correct in saying that the Act was written so that the – to allow participating candidates to accept [37] private contributions if, in fact, the Commission couldn't pay the money that was specified under the Act. That seems only fair to me and I believe was consistent with what was intended.

However, I believe we can't do that because of the wording of the stay order. I believe what Judge Silver intended to write was that the payment of matching funds under Arizona Statute 16-952 may not be

made, and that the payment of matching funds is hereby enjoined. However, that's not what she actually wrote. She wrote: A.R.S. 952 may not be applied. And the Supreme Court has told us that we must follow Judge Silver's stay; and therefore, I believe we have no choice but to do so, however unfortunate the Supreme Court's order may have been.

I would like to also add that my personal decision, and I believe the decision of the Commission, ought to depend not at all on the practical implications of this to Governor Brewer, or to Mr. Mills, or to any other candidate or candidate situation, nor to any sense of fairness that we might have in an objective sense. In that sense, I agree with – with – with Mr. Bouie, that the Act needs to be enforced strictly in accordance with law and solely as the Courts have told us to do so. And I believe that the only way we could do that is by [38] strictly analyzing and following exactly what the statute and the law says.

That's my statement.

CHAIRPERSON PARKER: Anybody else? Todd, do you have any concluding remarks?

COMMISSIONER SCARAMAZZO: I have –

MR. LANG: Uhm.

CHAIRPERSON PARKER: Oh, go ahead.

COMMISSIONER SCARAMAZZO: Excuse me one second. And – and I appreciate where you're coming from, okay, Commissioner. Not being a lawyer, though, and putting all that aside, I get down to the basic issue of fairness. What is fair here? And I think it's grossly unfair that activist judges at the federal level have interfered with the electoral – with the electorate's vote in Arizona that – that approved, this candidate signed on, I think they have a right to go ahead and defend themselves and to raise money in whatever manner they can to go ahead and make this a level playing field. Clean Elections was designed to do that and now the apple cart's been upset and they are at a definite disadvantage, and I feel for them. I do.

It think it's grossly unfair. I think the Court's trampled on the rights of Arizona citizens. And, you know, to see this thing play out more in the [39] courts I think is a travesty.

COMMISSIONER HOFFMAN: Madam Chair, if I may say: "Here, here" with regard to the activist judge's point.

CHAIRPERSON PARKER: Mr. Fairman.

COMMISSIONER FAIRMAN: I would absolutely agree with Commissioner Scaramazzo. I am – I'm very frustrated by this as well. And I – I have to go back to the very beginning, which is – is the Citizens Clean Elections Act. And I think the citizens – the purpose of that was to allow people to run – run their elections and – and be – and – and – and have

an equal playing field. The only way we can do that now is to declare an emergency and then worry about the – the, you know, what happens after that. But that's what I believe we need to do to allow fairness in this current election.

CHAIRPERSON PARKER: Thank you. I agree.

COMMISSIONER HOFFMAN: Madame Chair?

CHAIRPERSON PARKER: Yes.

COMMISSIONER HOFFMAN: I would agree and would like to declare an emergency; however, I feel barred by Judge Silver from doing so. And I would also point out that if we were to declare an emergency, it would allow candidates to accept private contributions to bring [40] their totals up to the adjusted spending limits. The adjusted spending limits are defined under the Act that she's enjoined. And so, since she's enjoined application of the Act, I think we're barred from adjusting the spending limits.

And so, you know, whether we declare an emergency or don't declare an emergency, because of the, I believe, sloppy and unintended wording of the injunction, the – it wouldn't help these candidates. And I certainly hope that Judge Silver correct – has the both ability and desire and to, you know, correct her order, so that the Act can work as intended in a situation where matching funds can't be provided.

Even if matching funds are – are unconstitutional and are not provided under the – under the Act, the Act provided a solution to allow candidates to accept private contributions to make up the difference, and that should not be enjoined because there's certainly, it seems to me, nothing unconstitutional about that. And I certainly hope that that is the outcome. However, I don't believe that we have the power to do that because I think the State prevents us from doing so, as our – our counsel and – and others have said.

CHAIRPERSON PARKER: Given all that, if – if [41] we as a body truly feel that her intent was only to prevent matching funds, why should these candidates suffer because of her lack of clarity in her writing of her order? And to me, it's like a breach of contract that we've made with these candidates, and they in good faith signed on to abide by the rules that we set up, and in midstream a third party comes in and changes those rules, I – I don't think it's fair.

COMMISSIONER HOFFMAN: I agree.

COMMISSIONER DANIELS: Madame Chairman.

CHAIRPERSON PARKER: Yes, Lori.

COMMISSIONER DANIELS: Madame Chairman, Todd, I have a question again. You said at one point in an election year we would have to have a unanimous decision of the Commission in order to

change a rule. Would that be, in this instance, the same?

MR. LANG: Madame Chair, Commissioner Daniels, no. Any action by the Commission today would require a simple majority, unless you wanted to modify a rule. The – the rule – the unanimous rule requirement is – is simply a statutory change we made a few years ago so that rules weren't changed during election years unless the whole Commission agreed it was a good idea.

COMMISSIONER DANIELS: Well, Madame Chairman, since everybody's weighed in, I'd like to just make a

* * *

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN McCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO [sic],

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY I. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS

No. CV08-1550-PHX-ROS

DEPOSITION OF NANCY McLAIN

Phoenix, Arizona
September 15, 2008
9:54 a.m.

CLEAN ELECTIONS COMMISSION,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.

Defendant-Intervenor

REPORTED BY:
MARTA M. RICE, CSR, RPR
Certified Reporter
Arizona Certificate Number 50746

PREPARED FOR:

ASCII/COPY

* * *

[14] Q. So in 2004, did you run as a participating candidate?

A. Yes.

Q. And why did you run as a participating candidate?

A. Several reasons.

Q. All right.

A. I had considered running as a traditional candidate. And in discussions with my husband, he had agreed that we would use personal resources to fund my campaign if – if necessary.

I then learned, and related to him, that over a certain amount, if we put personal funds in, that a like amount would be given to an opposing candidate.

My husband's direct quote was, "That's the craziest thing I've ever heard of."

And jointly we decided that we didn't want to put personal funds or use personal funds in that situation. And so I decided I would use the Clean Elections system.

* * *

[20] Q. And why did you decide to run as a participating candidate again in that election?

A. Well, there – there were several reasons. One was that I wanted a particular person to be my treasurer. And she was reluctant to be my treasurer if I ran a traditional campaign because of additional reporting [21] requirements and other factors that she felt she wouldn't be qualified to act in that capacity.

Q. Let me get this straight. Your treasurer wanted you to run under the – as a participating candidate because of the additional reporting requirements that she felt would occur because of a – I'm sorry – a traditional – a participating as opposed to a traditional candidate because of additional reporting requirements of a traditional candidate?

A. Yes.

Q. Was she aware of the reporting requirements under the Clean Elections Act for participating candidates?

A. Yes.

* * *

[40] What was the form of the expenditure by the Arizona Home Builders Association of Central Arizona? Was it a mailer or an ad?

A. Excuse me. It was a mailer. A postcard mailer.

Q. Okay. So I don't have to go through the whole description to say – The Arizona Home Builders Association of Central Arizona, their mailer, and you said it didn't – let me go back.

In your responses you said it did not benefit you. Is that correct?

A. Yes.

Q. Can you please explain how it did not benefit you, this mailer?

A. It was in support of the three incumbents in District 3. I have several –

Q. Can I just – who are the three incumbents? There's two. Are you talking about the senator as well?

[41] A. The Senator as well.

Q. Oh, okay. I'm sorry. Okay. Go ahead.

A. I have significant policy disagreements – differences, shall we say, not disagreements, with both the Senator, Ron Gould, and with Mrs. Groe. I was not comfortable being associated with the two of them. I had tried to run my own campaign and stand on my own merits. So I don't feel that this mailer was a benefit to me.

Q. All right.

A. And – well, let's just leave it at that.

Q. Okay. Now, I know that Mrs. Groe is a Republican. Is Mr. Gould a Republican?

A. He is.

Q. Can you please explain the differences you have that you were just discussing with, I guess, both Mr. Gould and Mrs. Groe. And I don't mean any disrespect; I guess I should say Senator Gould and Representative Groe.

A. I take a more pragmatic approach to legislating.

Q. That's rare.

A. They are not willing to compromise on most issues.

Q. Are there any specific issues that you have in mind when you state that?

A. I would say in general.

* * *

[58] Q. Okay. How is your campaign speech chilled by the Act's matching fund provisions?

A. Because for every amount of money that I raise, that money will be given as matching or equalizing funds. I'm reluctant to raise a great deal of money, or any money at this point, because it will be distributed to the participating candidates. And if I'm not able to raise additional funds, my speech will be chilled because I won't have the funds to broadcast my message, either via radio ads, newspapers, or other forms of communication that require funds.

Q. This is the same concern you had in 2004. [59] Correct?

A. No.

Q. Why not? How is it different?

A. When I ran as a participating candidate, I was not concerned about how much money my opponent would raise or not raise. As a participating candidate, I had a set budget, if you will, and so it did not – it was of no concern to me what was raised by anyone else.

* * *

[79] Q. Do you feel that you need to raise additional funds to prevail in November?

* * *

A. I would feel more comfortable having more funds on hand, but I'm reluctant to make any sort of

fundraising effort at this point because I don't want those matching funds to be given to my, in this case, two opponents.

* * *

[80] Q. Okay. Is that why you fear triggering matching funds?

* * *

A. Okay. I wouldn't say I fear triggering matching funds. I'm reluctant to do so. It seems to me that raising additional funds that triggers funds for my opponents discriminates against me because my efforts result in a – in rewarding, if you will, someone else for no effort. So I'm reluctant. I would not use the word "fearful."

* * *

[92] Q. I think you said earlier that you've already made the decision that you're not going to raise any more contributions in 2008. Is that correct?

A. Yes.

Q. So you're not going to send out any more fundraising letters. Is that correct?

A. That is correct.

Q. You're not going to hold any more fundraisers. Is that correct?

A. That's correct.

Q. And you're not going to make any more fundraising calls. Is that correct?

A. Yes.

* * *

[93] Q. Okay. Now, those plans not to raise any more contributions in 2008, would that change in mid-October if the Court enjoined the matching funds provision of the Act?

A. It's possible.

Q. How possible? How likely?

A. Likely.

Q. But if there is no injunction, you're telling us for certain that you will make no efforts to raise anymore contributions in 2008?

A. That is my plan.

* * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

v.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS

No. CV08-1550-PHX-ROS

DEPOSITION OF PAUL B. NEWMAN

Phoenix, Arizona
September 18, 2008
3:00 p.m.

CLEAN ELECTIONS COMMISSION,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.

Debtor-Intervenor.

PREPARED FOR:

(COPY)

Reported by:
Robin Jasper, RPR
CCR No. 50286

* * *

[35] Q. Let me rephrase the question and make sure it's accurate. To the best of your knowledge and recollection, approximately two to three weeks before September 3, 2008, your campaign, Sam George's campaign and Sandra Kennedy's campaign attempted to utilize a single campaign manager by [36] the name of Roberto Rodriguez?

* * *

THE WITNESS: Correct.

BY MR. DRANIAS:

Q. Go ahead.

A. Yes. He was brought in to attempt to create a message for, a message for the Solar Team.

* * *

[45] Q. Moving, forward to the 2008 primary election, then, you would agree that in the last two to three weeks of the election up until September 3, that you coordinated your campaign with Sandra Kennedy and Sam George's campaign?

A. Coordinated in the affect of coordinating advertising, correct.

* * *

[53] Q. Let me follow up on that. You said that you were concerned that the two Republican participating candidates and the Republican traditional candidate –

A. Mr. Robson, correct.

Q. – Mr. Robson, would have some kind of advantage.

What did you mean by that?

A. Well, Republicans usually have an advantage in this state. It was our understanding that they were running as a team, that's correct. That's my understanding coming from a number of sources, not necessarily from Mr. George or Ms. Kennedy. This was well known, well known.

Q. Well, why would that give them any sort of advantage?

A. Because they are supported by the nuclear and coal interests. And on top of that, they were the

ones who are going to manipulate the Clean Elections system, not me. I just wanted to run in this race.

Q. What do you mean, manipulate the Clean Elections system?

* * *

[54] THE WITNESS: What do you mean, manipulate the Clean Elections system? Isn't that why you are trying to do this deposition? I think it's ridiculous.

BY MR. DRANIAS:

Q. You used the term, so help me understand what you meant.

A. You are saying that we are manipulating the Clean Elections system. You are trying to make a deposition to appear in front of the judge as evidence. What I'm telling you is that the people you should be talking to is your Republican colleagues, not me. I ran because I care about climate change.

Q. Tell me how the Republicans are manipulating Clean Elections.

* * *

THE WITNESS: Mr. Robson dropped out. He was purportedly going to spend large sums of money. They were purportedly supported by the nuclear and coal industry. I don't know what happened to that. I don't know why it imploded. But if anybody manipulated the system, it was they, their

plan may not have worked. And perhaps the reason – that's the real reason we are here today, because nuclear and coal interests are really concerned that we get elected to the Corporation Commission.

* * *

[56] Q. Yeah. What is Exhibit 4?

A. Exhibit 4 is something that purports to be, looks like a web site for the Solar Team 2008, and it has Mr. George's name, my name and Sandra's name. And to be honest with you, I didn't have anything to do with this web site. I think it is probably Steve Brittle's. And I didn't know about it until after the primary was over, somebody showed it to me.

Q. Who is Steve Brittle, again?

A. Steve Brittle was a guy who was working pretty much exclusively with Sandra Kennedy.

Q. In your mind, what does "pretty much" mean?

A. Exclusively. I mean, he's a person who also helped me gather my $5 bills.

* * *

[63] Q. Supervisor Newman, taking a look back at Exhibit 4, do you see at the bottom of the first page where it says, "Please support their candidacies and vote for the Solar Team. Remember, it takes three to achieve a winning majority"? Do you see that?

A. Yeah. As I said, I wasn't aware of this until after the primary. But I do see that, it's here. And I believe the source is Steve Brittle.

* * *

THE WITNESS: I see it, yes.

BY MR. DRANIAS:

Q. Who are the Solar Team, again?

A. Who are the Solar Team?

[64] Q. Yes.

* * *

THE WITNESS: Who are the Solar Team? Well, I believe that what is known now as the Solar Team are Sam, Sandra and myself. Although there probably are other solar teams out there.

* * *

[72] Q. Let me just clarify. You would agree, then, in your early contributions you received certain funds from Steve Brittle?

A. $130 contribution, which is seed money, correct.

Q. And I asked you the question of whether or not you received any money through an electronic method, and you said you received money from Steve Brittle.

Do you remember that testimony?

A. Yeah. All I know – actually, I don't remember ever receiving anything from Steve Brittle in my hand. But when I reviewed my treasury records through my treasurer, I saw the name Steve Brittle and $130 as one of my many, many, contributors. But yeah, I don't claim to not have an association with Steve Brittle.

Q. Let me –

A. Steve Brittle is a friend of Sandra's.

Q. Let me direct you to the second page of Exhibit 4. This page has, again, a picture of flowers and [73] grass and the Solar Team 2008, Sam George, Sandra Kennedy, Paul Newman, but this time below that there's a section for volunteers.

A. Right.

Q. Do you see that?

A. Yeah.

Q. Do you see the check-off box towards the bottom that says, "I would like to donate funding. Amount to Offer"?

A. I see that.

Q. What do you take that to be?

* * *

THE WITNESS: It looks like a volunteer sheet to me. I have never seen it before today.

* * *

[74] Q. Let me ask you this way: Once you qualified for Clean Elections, once you became a participating candidate, could you still solicit funding?

* * *

THE WITNESS: No, and I didn't, I didn't. I did not. And there would be no reason to ask for funding, so I don't know what this is. And like I said, you are going to have to ask Steve Brittle about this, because I do assume that he had something to do with it. Because again, this looks like a document that Steve would have done. It never even came to me for approval, honestly.

BY MR. DRANIAS:

Q. You see at the bottom there's a date, 9-11-2008 in Exhibit 4?

A. It says 9-11-2008. Amazing.

* * *

[77] Supervisor Newman, you said before that you thought the Republicans were going to manipulate the Clean Elections system during the primary election for Corporation Commission. Tell me everything you meant by that?

* * *

THE WITNESS: Well, what I was trying to get [78] to was that there were rumors out there, many, many – okay. I will preface it like this. Many, many people advised me not to get involved in this

race, that there are powerful interests that are involved in this race. And to be honest with you, I'm very committed to having an effect on climate change for Arizona and the country. And what I presumed by very powerful interests being involved in a race involving energy, which is what the corporation Commission in the main regulates, I assumed that that meant nuclear interests, coal interests and then, of course, the major public utilities in the southwest, which are big players in the energy market for the country.

I have been involved in a coal case down in southeastern Arizona in which they were, one of the companies wanted to use clean coal, quote, unquote, clean coal technology. And I had nothing against clean coal technology. But long story short, after around six months of investigating, I and a group of other people, I in my role as County Supervisor actually helped stop that plan from happening. So I knew that I was a person who was not, quote, unquote, a friend of coal.

And so when I went around to the community, the community that knows about energy in Arizona and was told stay out of this race, very powerful interests are involved, I assumed that they mean nuclear and coal, [79] although they are the kind of people that would never explicate that. I'm explicating that on the record today.

And so when I heard that there was a, quote, unquote, team of Republicans, one who is going to be

running traditionally and two that were going to be running clean, I knew all three individuals, two pretty well, Marian McClure and Robson. I didn't know Stump all that well. But I assumed that they were going to be representing coal and nuclear interests and that Mr. Robson was going to be receiving monies from those interests.

And I was pretty outraged about that and I didn't want that team to get elected to the Corporation Commission. And I thought that the outside money interests and having some people run as clean, I thought that was manipulation of the system. That's what I meant.

BY MR. DRANIAS:

Q. So the thing that outraged you was the fact that contributions made by special interests to a traditional candidate would trigger matching funds to be given to each of his slate team members?

* * *

THE WITNESS: Yes.

BY MR. DRANIAS:

[80] Q. And you regard that as a manipulation?

A. Yes, I regarded that as - yeah, I interpreted that as being something that would be such a bad thing for stopping climate change on the planet, I didn't think that their policies would be good for Arizona. And I also thought that if – I never thought,

I never think that anybody running for the Corporation Commission should be taking money from any special interests.

As a matter of fact, the Corporation Commission is a fourth branch of government in Arizona. I think that people in it should be fair judges. It's really a judicial election. So, yeah, it's almost like saying that the court that's going to decide whether there's going to be a proliferation of nuclear or coal power in this state, when it's against the people's interests, that they could use their money to basically buy judges, I think was a manipulation, would have been a manipulation of the system. Now I still don't know what happened to Mr. Robson. But according to the sources that I heard, that's what was going on.

* * *

jmsteno.com
EXHIBIT NO. 3
Newman
9-18-08
R. Jasper

Citizens Clean Elections Commission

VOTE

✓

For today.
For tomorrow.

2008 Statewide & Legislative
Candidate Statements Primary Election

Citizens Clean Elections Commission
Voter Education Guide Paid for by the
Citizens Clean Elections Fund

Candidate Statement Pamphlet Primary Election

[Pictures Omitted In Printing]

Candidates for Corporation Commissioner

John Allen

Party:	**Campaign Funding:**	
Republican	Participating	**Web:** www.azallen.com

I'm John Allen and I'm running for the Arizona Corporation Commission. I've lived in Arizona since 1982. Tina and I have been married 23 years and have three sons Devin, Sean, and Max. I have a B.S Degree in Business from ASU; worked for America West in ground operations and have been a small business owner. I served in the state legislature for two terms and was a leading conservative in the House. My service has been recognized by groups like the Arizona Federation of Taxpayers, Center for Arizona Policy, Goldwater Institute, and many others for a stellar voting record. The ACC functions both in an executive and judicial capacity, making industry rules and settling disputes. The Commission is the gatekeeper to Corporation and LLC formation and reporting, it ensures the integrity of the securities marketplace, and most importantly, it oversees

utility rates and regulations. I'm running because we are facing the most difficult time in energy policy in our state's history. We need to add new power plants that can deliver affordable, clean, and timely energy; whether that is solar, nuclear, or natural gas. There are eight candidates, so start by voting alphabetically, if that helps.

Rick Fowlkes

Party:	**Campaign Funding:**	**Web:**
Republican	Participating	www.QualifiedACC.com

I am part of the Fowlkes, Swapp and Hobbs Team. Rather than settle for career politicians, we hope you will vote for three qualified professionals with lifetimes of experience in the critical areas that the Corporation commission regulates. I am a professional structural engineer with over 38 years experience, including projects in the electric power industry. I have designed power plants, substation structures, and transmission line structures. With this experience I will be able to offer a professional perspective on developing and maintaining Arizona's infrastructure. As a team, we believe in protecting ratepayers, providing for the lowest possible utility rates, and ensuring a long-term supply of clean water and electic [sic] power. We support incentives to encourage the development and use of renewable energy, but we would repeal the mandate that was recently passed by the ACC. Mandates like this will

cost the ratepayers hundreds of millions of dollars in higher fees. In fact, the ACC is already using these mandates to justify rate increases. Please read the submissions from Swapp and Hobbs and visit our website http://www.QualifiedACC.com to learn about our team. Three candidates for three open seats. We are Qualified, Competent, and Conservative and we ask for your vote!

Sam George

Party:	**Campaign Funding:**	**Web:**
Democratic	Traditional	

The SOLAR TEAM of SAM GEORGE, SANDRA KENNEDY, AND PAUL NEWMAN share a vision that clean energy can end foreign reliance on oil, provide reliable energy, and create a sustainable economy. The SOLAR TEAM will fight for SOLAR ENERGY INDEPENDENCE. Solar energy can power Arizona and the nation. Solar energy will fight climate change and generate thousands of green jobs in Arizona. I have two decades of experience. As Arizona's Deputy Secretary of State, I ran a state agency comparable to the Corporation Commission offices. I also helped write and pass the Arizona Voter Protection Act and the Clean Elections Act. I am proud to have the endorsements of Rep. Harry Mitchell, Rep. Gabrielle Giffords, and many others. The SOLAR TEAM of SAM GEORGE, SANDRA KENNEDY, and PAUL NEWMAN will achieve a Democratic majority on the Corporation Commission

– ending 16 years of One Party rule. Single Party Republican rule has kept us paying higher utility rates and has stopped significant clean energy generation. We must restore checks and balances on the Corporation Commission to protect Arizona consumers. Please support my candidacy and vote for the SOLAR TEAM. Remember, it takes THREE of us to achieve a winning majority.

Joseph Hobbs

Party:	Campaign Funding:	Web:
Republican	Participating	www.qualifiedacc.com

I am part of the Fowlkes, Swapp and Hobbs team. We are unique because unlike our opponents, none of us are State Legislators who have hit their term-limits, or are merely looking for another office to move into. We are trained professionals, each with experience in a critical field that the ACC regulates. As such, we bring immediate expertise to this critical work. None of our opponents have this real-world experience, so they will be relying on lobbyists and staff to teach them and train them. We hope you agree with us that the Commissioners should know more than their staff and the lobbyists who work for the utilities. I have been active in the telecommunications field for more than 33 years, many of which were spent in senior technical positions. My experience at the cutting edge of telecommunications technologies and infrastructure will be invaluable as Arizona deals with its growth

and the constant changes in this field. We are also all three solidly conservative candidates and we are the only team that can make that claim. Please visit www.QualifedACC.com to learn more about our team and our positions on ACC and non-ACC issues. We ask for your vote!

Kara Kelty

Party:	Campaign Funding:	Web:
Democratic	Participating	www.KaraKelty.com

For over 20 years I've done everything I can do to help protect our natural resources and environment. From planting trees as a young Peace Corps volunteer to two terms on the Flagstaff City Council, I have devoted my life to creating a cleaner, more affordable and sustainable economy. Now, with the support of consumer advocates and former Democratic Corporation Commissioners Renz Jennings, Marcia Weeks and Jim Weeks, I want to help our Arizona answer a fundamental question. Do we break free with new choices and an abundance of clean, affordable energy or do follow the failed energy policies of the past? I choose to break free. And I am not alone. Everywhere I go families and businesses are ready to embrace new choices, too. But our state's public utilities regulators, the Arizona Corporation Commission, have not. They remain stuck in old debates over how big the next utility rate hikes will be, when they can and should be promoting lower

rates through technologies that are already working, just not in Arizona. Finally, I'm proud to say that I am running a Clean Campaign for Clean, Affordable Energy without taking a dime from the big utility companies and their lobbyists.

Sandra Kennedy

Party:	Campaign Funding:	Web:
Democratic	Participating	www.kennedy4az.com

The SOLAR TEAM of SANDRA KENNEDY, SAM GEORGE, AND PAUL NEWMAN share a vision that clean energy can end reliance on foreign oil, provide reliable energy, and create a sustainable economy. The SOLAR TEAM will fight for SOLAR ENERGY INDEPENDENCE. Solar energy can power Arizona and the nation. Solar energy will fight climate change and generate thousands of green jobs in Arizona. As a former State Representative and State Senator, school board member, and State Democratic Party Executive Committee member, I have extensive campaign experience. I am proud to be endorsed by Congressman Harry Mitchell, Tucson City Councilwoman Nina Trasoff, and many others. The SOLAR TEAM will achieve a Democratic majority on the Corporation Commission – ending 16 years of One Party rule, and allow Arizona to gain economically with solar energy generation. Single Party Republican rule has kept us paying higher utility rates and has stopped significant clean energy generation. Arizona should be the leader in solar energy

generation, not in last place in the West. We must restore checks and balances on the Corporation Commission to protect Arizona consumers. Please support my candidacy and vote for the SOLAR TEAM because it takes THREE to achieve a winning majority.

Marian McClure

Party:	Campaign Funding:	Web:
Republican	Traditional	www.McCLURE4AZ.com

I was first elected to the Arizona House of Representatives in 2000 where I have served with distinction. As your Corporation Commissioner, I will continue to protect the people by keeping your utility rates as low as possible. I have never forgotten the promises I made to the people of Arizona. It is my responsibility to serve Arizonans with responsive government, less bureaucracy and a commonsense approach. I am asking for your vote on September 2.

Paul Newman

Party:	Campaign Funding:	Web:
Democratic	Participating	www.paulnewmanaz.com

The days of cheap energy are over. We're reminded every time we fill up our cars. We must acknowledge reality before our utility bills follow gas prices into the stratosphere. I'm a former legislator and Cochise County Supervisor. I'm endorsed by U.S. Reps. Ed

Pastor and Harry Mitchell and former Sen. Dennis DeConcini. Our Solar Team of Paul Newman, Sandra Kennedy, and Sam George shares a vision that clean energy means a sustainable economy that can avoid a doubling of future utility bills over the next 20 years. The Solar Team will utilize Arizona's biggest asset – the sun – while reducing energy costs and creating green collar jobs. Conservation is part of our plan, but there's more. We're competing with the world for oil, natural gas and coal. Competing for fossil fuels is a losing proposition. We must invest in proven and sustainable alternative power sources that won't burn fossil fuels at sky-high prices. Solar power, wind generation and other technologies can achieve energy independence for Arizona. The technology is here – what's missing is political will. Electing the Solar Team will place on the Corporation Commission a Democratic majority willing to stand up to powerful special interests. Thank you. Paul Newman

---

Bob Robson

Party:	**Campaign Funding:**	**Web:**
Republican	Traditional	www.robson4az.com

Bob Robson has been fighting for voters as an elected servant of the people of Arizona for over 16 years. Bob has a broad understanding of the issues that matter to real people – from his humble beginnings as a city councilman, to his statewide leadership as Speaker Pro Tern of the House of Representatives, Bob has

fought passionately for the passage of laws protecting consumers and small businesses. More than ever, our state's energy resources must be improved, well-managed, and strengthened to meet the future needs of our children and grandchildren. Protecting Arizona's critical water supply will continue to be a top priority for Bob. A lifelong Republican, Bob is the owner of a small business who understands the importance of planning for the future. Bob has continued his commitment to give back to the community by his involvement in Kiwanis Club and the Boys and Girls Club. Bob is devoted to fair, open, and transparent leadership. For more about Bob, please visit www.robson4az.com.

http://www.solarteam2008.com 9/11/2008

jmsteno.com
EXHIBIT NO. 4
Newman
9-18-08
R. Jasper

[LOGO] **The Arizona Corporation Commission**

- Learn More About Solar Energy
- Sam George
- Sandra Kennedy
- Paul Newman

- A
- A
- A

The Solar Team 2008
Sam George • Sandra Kennedy • Paul Newman

Menu

- Home
- More About Solar
- Help the Team
- Contact

The Solar Team

- Paul Newman
- Sandra Kennedy
- Sam George

Home
Welcome . . .

The SOLAR TEAM of SAM GEORGE, SANDRA KENNEDY, AND PAUL NEWMAN share a vision that clean energy can end foreign reliance on oil, provide reliable energy, and create a sustainable economy.

The SOLAR TEAM will fight for SOLAR ENERGY INDEPENDENCE. Solar energy can power Arizona and the nation. Solar energy will fight climate and generate thousands of green jobs in Arizona.

Sam George has two decades of experience. As Arizona's Deputy Secretary of State, he ran a state agency comparable to the Corporation Commission offices. He also helped write and pass the Arizona Voter Protection Act and the Clean Elections Act. He is proud to have the endorsements of Rep. Harry Mitchell, Rep. Gabrielle Giffords, and many others.

As a former State Representative and State Senator, school board member, and State Democratic Party Executive Committee member, Sandra Kennedy has extensive campaign experience. She is proud to be endorsed by Congressman Harry Mitchell, Tucson City Councilwoman Nina Trasoff, and many others.

Paul Newman is a former legislator and a current Cochise County Supervisor. He is endorsed by Congressmen Harry Mitchell and Ed Pastor, and former Senator Dennis DeConcini.

The SOLAR TEAM of SAM GEORGE, SANDRA KENNEDY, and PAUL NEWMAN will achieve a Democratic majority on the Corporation Commission – ending 16 years of One Party rule. Single Party Republican rule has kept us paying higher utility rates and has stopped significant clean energy generation. We must restore checks and balances on the Corporation Commission to protect Arizona consumers.

Please support their candidacies and vote for the SOLAR TEAM.

Remember, it takes THREE to achieve a winning majority.

Home > Help the Team

Volunteer

First Name MI Last Name

Your Address

Email

Phone

How would you be willing to help?

- ☐ I would like to donate funding!
  Amount to Offer _____
- ☐ Calling and walking in my neighborhood
- ☐ Organizing Coffee with the Candidate event
- ☐ Hosting a House Party
- ☐ Calling voters
- ☐ Canvassing
- ☐ Writing a letter
- ☐ Putting up a yard sign
- ☐ Anything

Comment/Note

68514 Enter Security Code Submit

Home > Contact
Contact
Steve Brittle
Campaign Manager

- Arizona, Maricopa
  United States
- Please contact with any questions.

Send an Email to this Contact:

Enter your name:

E-mail address:

Message subject:

Enter your message:

Send

Back

© SolarTeam2008.com Paid for by The Solar Team

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION GOLDWATER INSTITUTE
Nicholas C. Dranias
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462 5000/F: 602-256-7045
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, AND TONY BOUIE,

Plaintiffs,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

No. CV-081550-PHX-ROS

Hon. Roslyn O. Silver, presiding

DECLARATION OF DR. MARCUS OSBORN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. Fields of Expertise. I claim expertise in the fields of political science, public administration, interest group influence, policy analysis, lobbying and political campaigns. The attached Curriculum Vitae, marked Osborn Exhibit 1, accurately presents my academic and professional background relevant to my areas of expertise.

3. Basis of Expertise in Political Science, Public Administration, Interest Group Influence and Policy Analysis. I earned a Masters Degree and a Ph.D. in Public Administration from Arizona State University where my graduate training included work in policy analysis and public management. My grade point average in completing my Ph.D. was approximately 3.9 on a 4.0 scale. Additionally, I have undergraduate degrees in Political Science and History from the University of Arizona. I have recently published a book chapter "*Governors Lobbying and the Legislature: Evidence from a Pilot Study*" in Interest Groups & Lobbying: Volume One-The United States, and Comparative Studies. My dissertation, (2003) *Information or Money? Primary Influence of Arizona Legislator Information Source Reliance* and a related conference paper titled, *An Examination of the Effectiveness of Publicly-Funded Elections at Reducing Interest Group Influence:*

Lessons Learned from Arizona and Guidance for State Policymakers focused on the impact that PAC and lobbyist contributions had upon interest group influence in Arizona after the passage of the Citizen's Clean Election Act. These academic works applied both qualitative and quantitative analysis, which are each generally-accepted methodologies in the fields of political Science, public administration, interest group influence. My work has been accepted at academic conferences, including those organized by the Strategic Management Society, Midwest Political Science Association and the Association for Public Policy Analysis and Management. In addition to academic work, my expertise in political science, public administration, interest group influence and policy analysis led to my being appointed by former Governor Janet Napolitano to the Governor's Regulatory Review Council, which is charged with ensuring rules meet certain statutory criteria, including whether the benefits of the rule outweigh the costs. I have also worked for Arizona Department of Commerce, the Arizona Department of Environmental Quality and the Arizona Chamber of Commerce. My expertise in the fields of political science, public administration, interest group influence and policy analysis is also based on my professional experience in lobbying and working as a consultant for political campaigns.

4. Basis of Expertise in Lobbying and Political Campaigns. I have approximately 15 years of Arizona experience in legislative advocacy and campaigns. Currently, I am the Deputy Director

of Government and Public Affairs at R&R Partners and have been employed there since 1998. In my role as Deputy Director of Government and Public Affairs, I have represented businesses, trade associations and government agencies before the legislative and executive branches of government in Arizona. Since 1992, I have been active in numerous ballot measures and state legislative campaigns as an advisor. In these roles, I have advised clients on campaign strategy, reviewed polling data, designed and executed campaign pieces and provided guidance on messaging and communication. I have advised candidates including State Representative/Senator Carolyn Allen, Representative Mike Gardner, Representative Laura Knaperek, Representative Carol Somers, Representative Robert Meza, Representative Mark Thompson and legislative candidate Audrey Cohen-Davis. I commonly advise clients on political giving strategies for their Political Action Committees (PACs) and I currently sit on the board of the Greater Phoenix Chamber of Commerce Super PAC. My work with R&R Partners has included ballot advocacy efforts including the "No on 200" Campaign (2004), the "Arizona Hope Campaign, Yes on 207" Campaign 2006 and "Yes on 200" (2008).

5. Overview of Methodology. The findings, opinions and conclusions expressed in this declaration reflect generally accepted methodologies and are offered to a reasonable degree of scientific and professional certainty in my fields of expertise. It is generally accepted in my fields of expertise that both

qualitative and quantitative methodologies begin with the construction of testable hypotheses based on the consideration of one's own scientific and/or professional knowledge and/or a review of the relevant authoritative literature, if any. Where the two methodologies differ is in regard to the kind of data collected and the analysis of that data to test one's hypotheses. Qualitative methods usually consist of direct observation, surveying, interviewing, further literature review, and document review. Qualitative methods may include consideration of quantitative analysis, but they are not restricted to quantifiable methodologies or data, and may include reports of motivations, intentions and other data, which are only indirectly falsifiable or verifiable. Qualitative methods use verbal deductive and inductive techniques to understand, reduce, organize and draw findings and conclusions from data usually in a textual or narrative format. Null and alternative hypotheses are tested by qualitative analysis in the sense of determining whether they provide a logical explanation of the data. They are regarded as rejected when they are not logically consistent with the available data. They are confirmed when they are logically consistent with the available data. Accordingly, when I say that my qualitative method has confirmed my hypothesis to a reasonable degree of certainty, I am saying that I believe a reasonably complete data set was collected, the hypothesis is a logical explanation of all of the available data, and the hypothesis is a more robust explanation of the data than any of the alternative hypotheses I may

have considered. By contrast, quantitative analysis focuses on hypotheses and facts which *can* be expressed numerically and analyzed mathematically, usually statistically. The results of quantitative analysis are almost always probabilistic, so reasonable certainty in the context of quantitative analysis means that one is reasonably certain that one's methods of statistical analysis are mathematically correct and have yielded probabilistic results that warrant the highest degree of confidence one can reasonably expect for the tested hypothesis based on the nature of the data analyzed.

6. Both qualitative and quantitative methodologies are generally accepted scientific methodologies in the field of political science, of which the fields of public administration, interest group influence and policy analysis are subspecialties. Although there are strengths and weaknesses to both methodologies, and neither is inherently preferable to the other, it is my opinion as a political scientist that giving consideration to the widest possible array of relevant data is most consistent with the principles of a scientific methodology. Given the nature of my findings, opinions and conclusions in this Declaration, I believe that a qualitative methodology is the best method for considering all of the relevant data. Accordingly, all of my findings, opinions and conclusions that relate to my expertise in political science arise from a predominantly qualitative methodology. Likewise, as is often the case in other professions, the findings, opinions and conclusions I offer in the fields

of lobbying and political campaigns are based on a qualitative methodology arising from an assessment of the lessons learned from my professional experience.

7. I have attached as Osborn Exhibit 2 a genuine listing of all of the materials I considered in rendering the findings, opinions and conclusions of this Declaration. In conducting my investigations, I requested Plaintiffs' attorneys to furnish me with all data yielded by discovery in this case, including any adverse testimony or evidence. I also independently investigated relevant authoritative literature on all sides of each question addressed in this Declaration. I regarded sworn testimony, which was subject to cross-examination in court proceedings as an especially good source of qualitative data, considering that open-ended unsworn interviews are generally regarded as reliable data for qualitative analysis in the field of political science.

8. **Overview of Findings, Opinions and Conclusions.** First time candidates, veteran candidates, PAC administrators and a Clean Elections Commission member describe a pattern of how the matching funds component of the Arizona Citizens Clean Elections Act has a chilling effect on campaign speech. Arizona still maintains a stringent campaign finance regulatory system that includes strong provisions for candidate expenditure/contribution reporting as well as candidate and aggregate contribution limits on individuals and PACs. These regulatory measures alone are effective at preventing the

corruption and the appearance of corruption. The matching funds component adds nothing to the effectiveness of such measures and, in fact, injects or threatens to inject new kinds of corruption and the appearance of corruption into the electoral process. These findings, opinions and conclusion are based on a reasonable degree of scientific and professional certainty in the fields of political science, public administration, interest group influence, policy analysis, lobbying and political campaigns.

A. First Conclusion: Matching Funds Chill Speech. To a reasonable degree of scientific and professional certainty in the fields of political science, public administration, interest group influence, policy analysis and political campaigns, I have concluded that the matching funds component of the Clean Elections Act restricts campaign speech and changes the communication efforts of candidates. It does so by creating disincentives for candidates to raise and spend money to engage in campaign speech that discourage many traditional candidates and independent expenditure committees from engaging in uninhibited campaign fundraising and expenditures for fear of disseminating viewpoints hostile to their own.

(1) Methodology. In reaching this conclusion, I began my investigation with the hypothesis that matching funds restrict speech and change the campaign communication efforts of candidates and the null hypothesis that matching funds have no such effect. These hypotheses were formulated in

consideration of my professional experience as a political campaign consultant for traditional candidates, during which I considered the probable competitive impact of matching funds when formulating campaign tactics and strategies for traditional candidates. I then proceeded to test these hypotheses qualitatively by setting out to make findings based on an exhaustive review of the available authoritative literature and data, guided by the question "Is there evidence that the matching funds components of the Citizen's Clean Election's Act restrict speech and change the campaign communication efforts of candidates?"

(2) **Findings.** To a reasonable degree of scientific and professional certainty in the fields of political science, public administration, interest group influence, policy analysis, and political campaigns, based on my review of all reasonably available authoritative literature and data, I found that the available evidence logically supported my hypothesis that matching funds restrict speech and change the campaign communication efforts of candidates. First time candidates, veteran candidates, sophisticated independent expenditure committees and even a member of the Clean Elections Commission all confirmed in their interviews or testimony that the matching funds component of the Clean Election Act created a drag or "chilling effect" on their campaign fundraising and expenditures that tended to restrict and delay campaign fundraising and spending. In my review, not a single traditional candidate nor any

political action committee representative stated that the matching funds component of the Clean Elections Act had no impact on their campaign communication efforts. Significantly, the data underlying these findings included testimony by third parties as well as individuals who are adverse to the aims of Plaintiffs in this case. My findings were also consistent with my professional experience as a political campaign consultant in Arizona. And the quantitative data analysis of Plaintiff-Intervenors' expert, Dr. David Primo, further confirmed the qualitative data. Accordingly, my hypothesis was confirmed and the null hypothesis was rejected because there was clear evidence from multiple sources that the matching funds provisions of Act changed the spending behavior of candidates and political action committees.

(3) **Basis of Findings, Opinions and Conclusions.** I relied upon the following data to arrive at the findings, opinions and conclusions specified above. It is reasonable and generally accepted for experts in the fields of political science, public administration, interest group influence, policy analysis and political campaigns, to rely upon such data for qualitative analysis.

(a) **The Arizona Citizens Clean Elections Act.** One of the bases for my findings, opinions and conclusions is my understanding of the Arizona Citizens Clean Elections Act, A.R.S. §§ 16-941, *et seq*. The Act creates a system of "matching funds" government campaign subsidies for statewide

and legislative elected offices within the State of Arizona, for all candidates who choose to "participate" in the government campaign subsidy system, while purporting to give other candidates the option of running a traditional, privately-supported campaign. Candidates who elect to participate must collect an initial sum of seed money as well as the required number of $5 "qualifying contributions" from voters registered in their district. If they qualify, they receive a base-level grant from the Clean Elections fund. (Citizen Clean Elections Commission, "Voter Education Guide" (2008) available at http://www.ccec.state.az.us/cceceweb/ccecays/ccecPDF.asp?docPath=docs/2008PrimaryCandidateStatementPamphlet.pdf.) In 2008, Legislative candidates received $12,921 for the primary and $19,382 for the general election. Corporation Commission candidates received $82,680 for the primary and $124,020 for the general election.

When participating candidates have opponents who are non-participating – "traditional" candidates – they can also receive matching funds. Once a traditional candidate's primary election expenditures exceed the base-level grant given to participating candidates, her participating opponent or opponents will receive almost dollar-for-dollar matching funds from the CCEF. These funds cap out at three times the applicable spending limit. Leaving aside the deduction for early contributions, the matching funds are usually a dollar-for-dollar match minus 6%. A.R.S. § 16-952(A). Independent expenditures by Political Action Committees ("PACs") made on behalf of

a candidate – traditional or participating – or in opposition to her participating opponent also count towards the spending limit.

The Act's matching funds provisions function slightly differently during the general election period than during the primary election period. In the general election, matching funds are triggered by direct campaign contributions rather than direct expenditures. A.R.S. § 16-952(B). Specifically, matching funds to subsidized candidates will be triggered when the sum of contributions given to a traditional campaign in the general election period plus unspent contributions given during the primary election period exceeds the "general election spending limit." By contrast, independent expenditures still trigger matching funds during the general election period in essentially the same way as during the primary election. A.R.S. § 16-952(C). Each dollar of independent expenditures generates nearly one dollar in matching funds to each subsidized candidate running in the general election.

Based on these provisions, the matching funds component of the Clean Elections Act creates strong disincentives for rational traditional candidates and independent expenditure committees to raise and spend campaign money to speak unless they have the financial wherewithal to raise/spend in excess of all of their publicly funded opponents' maximum matching fund allocation – and even then, for rational candidates, the disincentives will exist to a diminished extent. A similar disincentive would not exist under

Arizona's campaign finance system absent matching funds. The question is not whether matching funds create a drag on campaign speech, but how much and when.

(b) The "Gaming Arizona" Article. Michael Miller's article in the well-regarded peer-reviewed academic journal, Political Science and Politics titled *"Gaming Arizona: Public Money and Shifting Candidate Strategies"* (2008) is another basis for my findings, opinions and conclusions. I have attached a genuine copy of this work as Osborn Exhibit 3. "Gaming Arizona" specifically reviewed the changes in campaign strategies that resulted from the implementation of the Clean Elections Act during the 2006 election through a combination of interviews and surveys.

In his research, Miller found that every non-participating candidate felt constrained by the matching funds component of the Clean Elections Act, reporting such interview statements as: "Every dollar I spend over the threshold starts feeding the alligator trying to eat me. So I have to be very careful with how I spend my money, which meant that I sent out a lot less mail and held a lot less events than I would but for my hands feeling like they were tied under this system. . . . Stories like this one were echoed by every candidate who had ever run traditionally against a Clean Elections opponent." (Osborn Exhibit 3, p. 529.) Another example is: "One traditional candidate described a campaign that was 'very calculating in how much we sent out to keep spending as

low as possible' in an effort to mitigate this effect." (*Id.*)

It is important to note that the opinion that matching funds provides traditional candidates with disincentives to spend money was universal among traditional candidates in the Miller's mind. And a pattern of delayed expenditures is highlighted in Miller's review of expenditure patterns from 2002-2006 where he demonstrated that the proportion of matching fund contribution distributions in the final week of the campaign cycle never dropped below one-third of the total expenditures. (*Id.* at 529.) In discussing the results of his surveys and interviews, the author suggests the matching funds elements of the Act have dramatically changed the campaign finance strategies of traditional candidates, "The desire for cost efficiency is present in all campaigns, but the effects of matching funds shift the spending calculus well beyond simple husbandry." (*Id.* at 528.) According to Miller (2008), "The belief in the existence of strategic expenditure timing is ubiquitous. According to every informant I interviewed traditionally funded candidates try to maximize competitive effect of the money that they do spend by releasing funds at the last minute giving the Clean Election candidate little time to react". (*Id.* at 529.)

While the sample of candidates surveyed by Miller may be small, the opinions from the participants are clear that there is a chilling impact on speech. The sample size was unavoidably small because the universe of candidates was small. It is

also important to underscore that there is no evidence the survey was designed to influence litigation or policy, and it was not conducted by an organization that stated its intent to utilize such work in its advocacy efforts.

(c) Defendant Commissioner Lori Daniels. The testimony of Arizona Citizen's Clean Elections Commissioner Lori Daniels is another basis of my findings, opinions and conclusions. Commissioner Daniels has extensive experience as both a candidate and as a regulator of campaign spending. She is in a unique position to observe matching funds' impact on candidates' behavior. Her testimony is clear that the Act's matching funds component impacts individuals and traditional candidates' willingness to contribute and spend money on their campaigns.

During her deposition, Commissioner Daniels was asked by Mr. Dranias, "You would agree that the availability of matching funds can influence whether a candidate makes or doesn't make expenditures?" Commissioner Daniels replied "Yes". (Daniels Dep., pp. 67, 68.) Similarly, Mr. Dranias asked Commissioner Daniels, "You would agree that the availability of matching funds can influence whether an independent expenditure committee makes or doesn't make expenditures?" Again, Commissioner Daniels replied affirmatively with the response, "Yes". (*Id.*) In response to the question, "Why don't you think the matching funds provisions of the Act are constitutional?" Commissioner Daniels testifies: "Freedom

of speech, First Amendment. I think when you do that you're basically saying that – you're eliminating my-my constitutional right as an outside individual to expressly advocate for a candidate that I want. And so I think when you do that with matching funds, you violate First Amendment rights." (*Id.*, p. 75:5-48.) When asked, "[f]or those individuals who are aware of the impact of matching funds and for those individuals who are engaged in decisions about fundraising or expenditures in support of their campaign, wouldn't you agree that there would always be a chilling effect of some magnitude on their fundraising and expenditure decisions?" (*Id.*, p. 90:10-17.) Commissioner Daniels responds, "The majority of the time, is it a chilling effect with matching funds, Yes." (*Id.*, pp. 91.:3-5, 92:11-16.) Commissioner Daniels eventually admitted to being familiar with the strategies of *ten* candidates, *not including Plaintiffs*, and that "at least 80 percent" would be chilled by matching funds and that there is "nothing inherently incredible" about Plaintiffs' testimony that they had "been chilled by matching funds in the course of their candidacies." (*Id.*, pp. 98-99.)

(d) Executive Director Todd Lang. A portion of the testimony of Arizona Citizen's Clean Elections Executive Director Todd Lang is another basis of my findings, opinions and conclusions. Despite otherwise doggedly defending the implausible position that the Act's matching funds component does not discourage campaign expenditures or fundraising by candidates, Director Lang

eventually admitted, "I suppose a person might refrain in contributing if they thought it might trigger matching funds." (CCEC Dep. (Lang), p. 247:20-22.)

(e) Defense Witness Rep. David Lujan. The testimony of Democratic Representative David Lujan is another basis of my findings, opinions and conclusions. Rep. Lujan, also a disclosed witness for the Defendants, has admitted that the competitive costs associated with matching funds likely cause traditional candidates and independent expenditure committees to spend less money on campaigns. For example, when asked "In terms of the magnitude of the reduction in the costs of campaigns after clean elections, you would agree that it's reasonably accurate to state that the cost of campaigns has dropped by more than half?" Rep. Lujan responded, "I would agree with that, yes." (Lujan Dep. pp. 23-24.) And when asked "you would agree that a component of the reduction in the cost of campaigns can be attributed to the effect that matching funds has in discouraging traditional candidates and independent expenditure committees from making expenditures in a campaign?" Rep. Lujan said, "Yes, I would agree with that." (*Id.*) Rep. Lujan further explained that "I think under clean elections they are less likely to make an independent expenditure if they see that the value of that independent expenditure is going to be weakened because it's matched by the clean elections system." (*Id.*, p. 26:8-14.)

(f) Democratic P.A.C. Victory 2008. Evidence generated in recent litigation by Victory 2008, a political action committee funded by resources from the State Democrat party, and the Arizonans for a Healthy Economy (a group managed by the leadership of the Phoenix Firefighters Union), is another basis for my findings, opinions and conclusions. It highlights the restricting impact of the matching funds component on potential speech. I have attached as Osborn Exhibits 4, 5, 6 and 7, genuine copies of the Verified Complaint, the Weeg and Whitaker Declarations, and the Transcript of Proceedings in *Victory 2008 v. Citizens Clean Elections Commission*.

During the 2008 General Election, Victory 2008 and Arizonans for a Healthy Economy filed suit against the Citizens Clean Elections Commission disputing the authorization of matching funds to publicly funded candidate David Stevens (State Legislative District 25). The Victory 2008 and Arizonans for a Healthy Economy committees were both well-funded political action committees financed with approximately $708,000 and $508,000 in contributions respectively (I obtained this information from the Arizona Secretary of State's website report of Victory 2008 Post General Campaign Finance Report Summary of Finances, http://www.azsos.gov/cfs/PublicReports/2008/1417AD7D-90B7-429F-89B4-2E72056EB6C9.pdf, and Arizonans for a Healthy Economy 2008 Post General Report Summary of Finances, http://www.azsos.gov/cfs/PublicReports/2008/62BDF1A3-6B15-4608-AD7F-BA93680A45CA.pdf).

These resources were to be used for independent expenditures in legislative races. (Victory 2008 Post General Report-Independent Expenditures Report, pp. 5-26; Arizonans for a Healthy Economy Independent Expenditure Report, pp. 8-19.) Both committees believed that publicly funded legislative candidate David Stevens was ineligible for the matching funds component of the Citizens Clean Elections Act because he failed to attend the statutory mandated debate and he did not make a timely request for an exemption to debate requirement. (Osborn Exhibit 7 (Victory 2008 v. CCEC), pp. 16-28.) Since candidate Steven had an unexcused absence from the mandated debate, it was their opinion that candidate Stevens would not receive matching funds if either political action committee made contributions against his candidacy in support of one of his opponents. *Id.* Both committees made independent expenditures believing that candidate Stevens would not receive matching funds but were subsequently informed that the Clean Elections Commission decided to award him matching funds despite his failure to participate in a mandated debate. When the Clean Elections Commission issued a decision to award candidate Stevens matching funds, both organizations filed suit to prevent the distribution from occurring. In declarations supporting their litigation, Maria Weeg, Campaign Manager for Victory 2008, stated expenditures would not have been made in District 25 if they would have known that Mr. Stevens would receive matching funds. Specifically, under penalties of perjury, she

testified, "Had Mr. Stevens been eligible for matching funds, Victory 2008 would not have made any independent expenditures in legislative district 25." (Osborn Exhibit 5 (Weeg Dec.), p. 2:13-14.) Similarly, William Whitaker, Treasurer for Arizonans for a Healthy Economy, declared under penalties of perjury, "Had Mr. Stevens been eligible for matching funds, AFHE would have not made independent expenditures on October 23, 2008 in legislative district 25." (Osborn Exhibit 6 (Whitaker Dec.), p. 2:13-14.) In my professional judgment and experience as a political campaign consultant in Arizona, it is my opinion that this approach reflected a sound campaign plan in which a political action committee attempts to maximize the use of their funds across the state of Arizona.

The sworn testimony at a hearing in the *Victory 2008 v. Citizens Clean Elections Commission* proceeding provides further support to the strategic impact matching funds had upon political action committees. Subject to cross examination by one of the defense attorneys in this case, Tanja Shipman, Whitaker further detailed the strategic approach to their independent expenditure efforts. When responding to the question, "In making the decision as to whether or not to make an expenditure, can you, tell us generally – and then we'll get specifically to LD 25, Legislative District 25 – what role the matching funds provisions under Clean Elections plays?" Whitaker replied, "It played a huge role. And Arizonans for a Healthy Economy conducted efforts

in numerous districts. And we actually had more districts that we would like to be in. But because of the matching funds issue, there were decisions made to not advocate in specific districts because – because of the matching-funds issue. That was one step. The second step was other districts that we didn't want to go into – we didn't want to advocate in until very late because of the matching-funds issue." (Osborn Exhibit 7 (Victory 2008 v. CCEC), pp. 25:14-25, 26:1-13.) This highlights that Victory 2008 and Arizonans for a Healthy Economy both made campaign spending and communication timing decisions based on whether a candidate they support had a publicly-funded opponent. And if these well-financed political action committees are deterred to speak/spend campaign resources, it is reasonable to infer that the impact of matching funds on lesser funded political action committees is likely to be more dramatic.

(g) Plaintiff Tony Bouie. Tony Bouie's statements and testimony are another basis for my findings, opinions and conclusions. Tony Bouie's declaration, which he affirmed at his deposition and which I supplemented with a personal interview on April 22, 2009, identifies a lengthy period of time during which he refrained from significant expenditures after seeing the impact of matching funds on Carl Seel's campaign. (Bouie Dep., p. 34:10-13; Bouie Dec. (ECF 13-5, pp. 5-6).) Bouie's silence, however, did not occur during a time when campaigning was not important. In the Corporation Commission primary, Sam George spent nearly

$200,000 on his campaign during the last two weeks of the primary election. (George Dep., pp. 35:17-25, 36:1-10, 59:4-18.) Rather than expend funds that would generate additional resources to be used by his participating opponent, Carl Seel, candidate Bouie made a conscious decision to withhold expenditures until just before the primary election date in an attempt to mitigate the damage that matching funds would have had upon his candidacy. Since candidate Bouie faced a teamed-campaign that included both a traditional candidate, Sam Crump, and a participating candidate Carl Seel, candidate Bouie anticipated that the matched dollars provided to candidate Seel would be multiplied through the use of joint expenditures by his opponents. In withholding expenditures, candidate Bouie limited his ability to communicate to early voters (voters who vote by mail prior to the primary date) to avoid providing his opponents additional resources to work against him. Candidate Bouie's traditionally funded opponent Sam Crump had a significant advantage because as a teamed candidate he could anticipate the use of matching funds by his teammate Carl Seel and leverage the use of his campaign dollars through joint expenditures. This advantage is created by the matching funds components of the Act.

Candidate Bouie faced an extremely acrimonious primary election which, in his mind, could have put him at risk in the general election had he been successful (this fact is common knowledge in the political campaign consulting field in which I conduct

business, it is also verified by the New Times' March 31, 2009 cover story and investigative piece on the Clean Elections system, "The Dirty Truth About Clean Elections," which is available here: http://www.phoenixnewtimes.com/2009-04-02/news/the-dirty-truth-about-clean-elections/, a genuine copy is attached to this Declaration as Osborn Exhibit 8, together with a genuine copy of the print cover page). So if hypothetically, candidate Bouie did not face the potential of running against participating candidates in the general election, candidate Bouie had a strong rationale to implement a well-funded campaign to repair damage that was done to his candidacy in the primary. Had candidate Bouie been able to overcome the teamed candidates in the primary election, he would have faced at least two participating candidates in the general election. Tony understood that for every dollar he raised, his potential Democrat opponents would be matched with two dollars once the contribution limits were reached. The disproportionate nature of the matching funds would have created a strong disincentive for candidate Bouie to attempt to remediate his name after a bitter primary. As a result his speech was chilled as reflected by this quote, "My speech will be chilled by the Act's matching funds provisions because I will be made reluctant to contribute or loan to my campaign knowing that each of my two opposing participating candidates will receive nearly one dollar for every dollar I raise and spend one dollar and one dollar for every dollar someone independently spends to support my campaign. This would allow two dollars to

be used against me for every one dollar I raise or which is spent by virtue of my promotional activities." (ECF 13-5, pp. 4:23-28, 5:1-2 (Bouie Dec.) In looking at the potential financing advantage as described in the chart below, the matching funds component of the Act structurally creates a significant advantage for teamed public and private opponents.

Bouie versus Crump & Seel: Traditional vs. Traditional-Participating Team for State Legislature (2008 Party Dominate Primary)

Traditional (A) (Bouie) versus	Traditional (B) (Crump) Teamed	Participating (C) (Seel) Teamed
Substantially more than $116,292 in expenditures needed to overcome economies of scale generated by the team (an unlikely amount to raise in Arizona)	$58,146	$58,146

Crump and Seel running as team in the primary election had a substantial advantage over Bouie due to matching funds.

1. The teamed candidates can anticipate and plan for the matching funds generated by the traditional team (B) member. This planning provides more flexibility for early voting expenditures as the matching dollars can be

redirected against the traditional candidate (A).

2. Many of the expenditures made by the traditional teammate (A) will be matched up to the limit for participating teammate (B) and can be used for coordinated purposes.

3. The teamed participating candidate can be matched when the traditional candidate (B) makes an expenditure against their mutual opponent or in support of candidate (B). This is the functional equivalent of contributions by candidate (B) to candidate (C). Responsive expenditures by candidate (A) will then trigger additional matching funds for candidate (C).

(h) Plaintiff John McComish. Representative John McComish's statements and testimony are another basis for my findings, opinions and conclusions. During the 2008 election cycle, McComish was a candidate for the Arizona State House of Representatives' District 20 running as a traditional candidate. During the 2008 primary election cycle, he ran for re-election as a traditional candidate and faced three participating opponents. Thus, he faced the threat that, for every dollar he spent above the spending limit, three dollars would be disbursed to his opponents – one to each participating candidate.

During the primary election, around August 20, 2008, McComish testified that he decided not to spend campaign money on an "auto-dialer" program.

which cost about $2,500, to avoid triggering matching funds to participating opponents. (McComish Dep., pp. 62:9-25, 63:1-7.) Spending the $2,500 would have triggered approximately $7,500 in the aggregate to the three participating candidates opposing him. Additionally, McComish has testified that some $6,000 was spent to support his candidacy during the primary election as an independent expenditure by the Arizona Realtors Association. (McComish Dep., p. 30:15-23.) The Arizona Realtors Association did not confer with McComish before sending the mailing. This independent expenditure triggered approximately $18,000 in the aggregate to the three participating candidates opposing him. (McComish Dep., p. 32:3-5.) McComish stated that expenditure "hurt more than it helped;" while "the expenditure on [his] behalf was not consistent with what [he] was trying to do . . . [his] opponents received the cash so that they could use it efficiently."

With respect to his candidacy in the general election, McComish also testified that he would certainly amass campaign contributions, personal contributions or personal loans to [his] campaign beginning on September 3, 2008 in excess of $25,000." However, due to the matching fund provisions, he "will certainly neither raise campaign contributions, contribute to, nor loan [his] campaign any amount more than $14,000 above any applicable general election spending limit." Further, he states "[l]ikewise, I will be more fearful of promoting my candidacy and less active in promoting my candidacy

than in the absence of the Clean Elections Act, for fear that my opposing subsidized candidate will receive one dollar for every dollar someone or some organization independently spends to support my campaign." (ECF 43-4, pp. 6:21-28 (McComish Dec.).) Subject to cross-examination, Representative John McComish also testified in his September 11, 2008 deposition, "My speech was chilled, and one way was that I did not make a campaign expenditure, and I was given advice to do that, because I knew it would be matching funds to my competitors." (McComish Dep., p. 61:11-15.) The structure of the primary campaign with three publicly funded opponents creates a significant asymmetric financial advantage to his primary participating opponents since each dollar that he spent or a supporting PAC spent was matched three times.

McComish versus Dial, Schmuck and Swann: Traditional Candidate vs. Three Participating Candidates in the Primary (2008 Party Dominate Primary)

Traditional Candidate (A)	Participating (B)	Participating (C)	Participating (D)
Must spend substantially more than $174,438 to overcome matching funds (exceedingly unlikely amount to raise in Arizona)	58,146	58,146	58,146

(i) Plaintiff Nancy McLain. Representative Nancy McLain's statements and testimony are another basis for my findings, opinions and conclusions. McLain was a candidate for the Arizona House of Representative's third district. During the general election, McLain testified that "there is no question that . . . my campaign speech will be chilled by the Act's matching funds provision . . . I will be made more reluctant to personally contribute or loan money to my campaign than I otherwise would have been in the absence of these provisions, knowing that my opposing participating candidate in the general election, Pamela Durbin, will receive nearly one dollar for every dollar I raise and one dollar for every dollar someone independently spends to support my campaign." (ECF 43-5, p. 4:2-9 (McLain Dec.)) And during the primary election, McLain testified that making expenditures that would have triggered the matching funds for her opponents created a strong disincentive for her to communicate with voters, stating "[b]ecause for every amount of money that I raise, that money will be given as matching or equalizing funds. I'm reluctant to raise a great deal of money, or any money at this point, because it will be distributed to the participating candidates. And if I'm not able to raise additional funds, my speech will be chilled because I won't have the funds to broadcast my message, either via radio ads, newspapers, or other forms of communication that require funds." (McLain Dep., p. 58:16-24.)

(i) Plaintiff-Intervenor Robert Burns. Senator Robert Burn's statements and testimony are another basis for my findings, opinions and conclusions. Senator Burns represents Legislative District 9. Burns testified in his deposition that he is forced to "censor [himself] in order to avoid triggering matching funds to [his] government-funded opponent." (ECF 150-3, p. 80:8-16 (Burns Dec.)) He adds that he "will be forced to stop accepting contributions to [his] campaign to make sure that [he does] not exceed the Act's expenditure limitations for this race." (*Id.*) On one occasion, he turned away a contribution check in order to avoid triggering matching funds. (Burns Dep., p. 45:7-24.)

(j) Plaintiff-Intervenor Rick Murphy. Representative Rick Murphy's statements and testimony are another basis for my findings, opinions and conclusions. Representative Murphy represents Legislative District 9. During the 2008 election cycle, he ran for re-election as a traditional candidate and faced three participating opponents. (ECF 150-3, pp. 50-53 (Murphy Dec).) Thus, Murphy faced the threat that, for every dollar he raised above the spending limit, three dollars would be disbursed to his opponents – one to each participating candidate. In the midst of the general election, he testified that may "be forced to forgo any fundraising in order to avoid assisting [his] opponents by sending government checks directly to their taxpayer financed campaign war chests." (*Id.*)

(k) Plaintiff-Intervenor Arizona Taxpayers Action Committee ("ATAC"). The testimony from Shane Wikfors, the treasurer of ATAC, is another basis for my findings, opinions and conclusion. ATAC is an Independent Expenditures Committee that was organized in 2006 and made independent expenditures on behalf of a legislative candidate in a primary election that same year. The group's treasurer testified that the group intends to participate in 2008 legislative races, however, "a decision must be made whether to engage in the political speech that represents our donors' interests, but which may aid the very candidate whom Arizona Taxpayers oppose." (ECF 49, p. 4 (Wikfors Dec.).) ATAC alleges that the knowledge that its donations will aid a candidate it opposes "will prevent [ATAC] from the full and unrestricted exercise of its speech," and therefore that "the Act creates a climate of self-censorship resulting in less political speech." (*Id.*)

(l) Professional Experience. My professional experience as a political campaign consultant is another basis for my findings, opinions and conclusions. Based on my experience as a political campaign consultant in Arizona, and seeing what tactics and strategies succeed or fail over fifteen years of legislative and statewide office campaigns involving Senator Randall Gnant, Representative/Senator Carolyn Allen, Representative Mike Gardner, Representative/Senator Barbara Leff, Governor Candidate Matt Salmon, Representative Carol Somers, House of Representative Candidate Audrey Cohen

Davis, Legislative Candidate Roberta Voss, Representative Chad Campbell, Representative Robert Meza, Senator/Corporation Commission Candidate Jim Buster, Representative Robin Shaw, Representative Laura Knaperek, Senator Brenda Burns, State Treasurer Dean Martin, Representative Michelle Reagan, Representative Andy Tobin, Representative/Senate Candidate Pete Hershberger, I have become intimately familiar with Arizona's campaign finance regulation system, including the Clean Elections Act and implementing regulations. In the course of my career, I have learned that raising and spending money to get a candidate's name and message out is essential to winning an election. Accordingly, within the context of competitive elections where traditional candidates are not gaming the system, it is my judgment to a reasonable degree of professional certainty as a political campaign consultant, that the Act's matching funds component impose a significant "cost," or competitive disadvantage, on traditional candidates with respect to raising and spending money that would not exist in a world without matching funds. And, as a matter of professional practice, I have advised and will continue to advise traditional candidates to minimize the "cost" of matching funds by minimizing fundraising or spending to minimize matching funds and/or to alter their mode of fundraising and spending in ways that minimize the benefit of matching funds to their competitors. Moreover, based on numerous conversations with other campaign consultants I have had in the course of honing my tactical and strategic knowledge of

political campaigns in Arizona between 1998 and 2009, including Keely Varvel, Michelle Davidson, Mike Gardner, Burt Coleman, Jeff Sandquist, Janna Day, Chuck Coughlin, Greg Ensel, Karen Kruse, Kyle Moyer, Gibson McKay, Stan Barners and Mario Diaz, in Arizona, I believe that it is a generally accepted professional practice in the political campaign consulting field to give such advice to traditional candidates and political action committees who oppose participating candidates. Most candidates have campaign consultants. Candidates, of course, generally listen to the advice of their campaign consultants on such matters of campaign tactics and strategy. And it would be implausible to expect most candidates to act inconsistently with such advice.

(m) Plaintiff-Intervenors' Expert Reports. The original and rebuttal reports of Dr. David Primo are another basis for my findings, opinions and conclusions. I have attached as Osborn Exhibits 9 and 10 genuine copies of Dr. Primo's original and rebuttal reports. Using generally accepted statistical methodologies, Dr. Primo found that matching funds had a statistically significant impact on campaign expenditures. These quantitative studies complete the picture painted by the qualitative evidence discussed above. It is significant to me that the expert witnesses retained by the defense did not establish an affirmative quantitative case in rebuttal despite having presumably greater resources and superior access to relevant quantitative data from Arizona Secretary of State Ken Bennett.

In sum, the Clean Elections Act matching funds component incentivizes traditional candidates to withhold communication or delay communication in the primary election and to avoid fundraising or delay fundraising in the general election, which has the same effect. Neither of these patterns of behavior appears to promote an effective conversation between the electorate and the voting public. If the public policy goal is to have a robust dialogue between candidates and citizens throughout the entire campaign period, the matching funds component of the Act retards that goal by providing incentives to traditional candidates to either limit campaign speech or to withhold its execution until just before the election. This results in suppressed communication during the campaign and creates a mad dash of expenditures and matching funds in the last week before the election.

B. Second Conclusion: Matching Funds Do Not Prevent Corruption or the Appearance of Corruption. To a reasonable degree of scientific and professional certainty in the fields of political science, public administration, interest group influence, policy analysis, lobbying and political campaigns, it is my conclusion that the Act's matching funds component does not prevent corruption or the appearance of corruption.

(1) Methodology. In reaching this conclusion, I began my investigation with the hypothesis that matching funds do not prevent corruption or the appearance of corruption and the alternative

hypothesis that matching funds prevent corruption or the appearance of corruption. I also formulated a number of subsidiary hypotheses connection with investigating the bases of my findings. These hypotheses were formulated in consideration of the central justification given in the authoritative literature for campaign finance regulation – the goal of preventing corruption or the appearance of corruption. I then proceeded to test these hypotheses predominantly qualitatively by setting out to make findings based on an exhaustive review of all available authoritative literature and data, guided by the question "Do the matching funds provisions reduce the potential for corruption and the appearance of corruption among elected officials?"

(2) **Findings.** My conclusion that the Act's matching funds component does not prevent corruption or the appearance of corruption was based on a constellation of findings, all of which were rendered to a reasonable degree of scientific and professional certainty in the relevant fields of expertise. First, I found that, if by corruption or the appearance of corruption, one means the actual purchasing of votes or governmental action through campaign financing, to a reasonable degree of certainty in the field of political science, there is no consensus in the available authoritative political science literature indicates that there is a direct casual [sic] relationship between campaign financing and voting or governmental action. Second, if by the appearance of corruption, one means the appearance that campaign

financing is the sole or primary influence on voting or governmental action. I found that the wide discretion enjoyed by the Citizen's [sic] Clean Elections Commission in awarding matching funds itself creates the appearance of such corruption when combined with the Commission's extensive lobbying efforts. Third, I found that, if by corruption or the appearance of corruption, one means campaign financing is or appears to be a substantial or primary influence on voting or governmental action, then Arizona's system of low contribution limits is already adequate to prevent private campaign contributions from creating the potential for or appearance of corruption, and the availability of matching funds does not improve upon what low contribution limits already achieve in this regard. Moreover, if bundling of private campaign contributions is perceived to create corruption or the appearance of corruption, then the Act's matching funds component does nothing to alleviate this problem because the Act permits bundling of qualifying contributions. Fourth, and last, to a reasonable degree of scientific and professional certainty in the fields of political science, public administration, interest group influence, policy analysis, lobbying and political campaigns, I found that the matching funds component incentivizes and has resulted in corruption and the appearance of corruption through various gaming strategies, such as teaming and reverse-targeting, which effectively allow contribution limits to be bypassed, amplifying with public funding all of the asserted problems of private campaign financing including deceptive campaign practices. Accordingly,

my hypothesis was confirmed and my alternative hypothesis was rejected because the data admitted only of one logical inference, that the Act's matching funds component does not prevent corruption or the appearance of corruption.

(3) Basis of Findings, Opinions and Conclusions. I relied upon the following data to arrive at the findings, opinions and conclusions specified above. It is reasonable and generally accepted for experts in the fields of political science, public administration, interest group influence, policy analysis, lobbying and political campaigns, to rely upon such data for qualitative analysis.

(a) Basis No. 1: Absence of clear statistical correlation between campaign financing and voting or governmental action. For years scholars have been attempting to correlate campaign contributions to legislative voting behavior. These attempts have yielded mixed results (I have attached a genuine copy of the Smith, 1995, article as Osborn Exhibit 11). And it is my understanding that defense expert, Dr. Kenneth Mayer, has conceded as much. (ECF 133-3, p. 9 (stating "[t]he academic literature has not found a strong relationship between campaign contributions and official acts.") Corresponding to this research, which largely focuses on the behavior of legislators in Congress which maintain much higher campaign finance limits, in Arizona, the Goldwater Institute completed a research project to evaluate the relationship between campaign contributions and the lobbying success of various interest

groups (I have attached a genuine copy of the Franciosi, 2001, article as Osborn Exhibit 12). This report is particularly pertinent because it is the first examination of the behavior of legislators who participate in Clean Elections compared to their traditionally funded colleagues. The Goldwater Institute tracked the PAC contributions of approximately 40 interest groups from diverse backgrounds. The results that used generally accepted methods suggest that there were not strong voting behavior differences between Clean Election candidates and other candidates.

(b) Basis No. 2: Clean Elections Commission's wide discretion and extensive lobbying efforts. The Citizens Clean Elections Commission (CCEC) role as a regulator of campaign contributions, a distributor of matching funds and an active interest group create the potential for the appearance of corruption. The CCEC has an active program to lobby the Arizona State Legislature and the Governor's office on legislation relating to the operation of their agency and elections in general. The CCEC's lobbying effort goes well beyond simply monitoring legislative activities and providing input when requested by policymakers. The CCEC's legislative program involves advocacy with the purpose of advancing their organizational needs. To support this effort, the CCEC has retained one of the most influential contract lobbying firms, Williams and Associates, for fees ranging between $78,000 and $90,000 per year (Daniels Dep., pp. 198:8-17, 263-64, 278, Ex

21; CCEC Dep. (Lang), pp. 296:18-25, 297:1-9, 308-10, Exs. 4, 5; Sinema Dep., pp. 22-26.) Given my experience in the Arizona market as a contract lobbyist and as an interest group scholar, this is a substantial contract given the very limited scope of issues that the lobbying firm must address. It is a common practice in the lobbying industry to price contracts in part on the scope of the work (range of policy issues to be addressed) as well as the level of proactive work needs to be conducted. Thus, a client who requires a broad cross-section of issues to be covered in a proactive manner would require higher levels of compensation. For a state-agency contract, the Williams and Associates contract reflects a narrow scope of service but appears to be priced for the purposes of pursuing a proactive agenda. This is evidenced by the fact that in the 2009 legislative session, the CCEC has been actively and aggressively lobbying members through Mike Williams, with Executive Director Todd Lang's direct involvement, to amend the Clean Elections Act to eliminate its matching funds component and replace it with massively increased contribution limits for both participating and traditional candidates. (CCEC Dep. (Lang), pp. 270-308, Ex. 30.)

Undertaking a lobbying effort places the CCEC in a precarious position as they are lobbying the very Legislature that CCEC is empowered to police as an election regulatory body and distributor of funds. Effective lobbying is based on developing trusted relationships with policymakers. This requirement

may run counter to the CCEC's statutory mission to be an impartial regulator and a disbursement agency for campaign funds. Many of the CCEC's regulatory and disbursement decisions may create concerns or favorable attention from the very people that the agency will need to lobby to obtain legislative approval for statutory changes. In fact, one of the purposes of the retention of Williams and Associates was to rebuild the relationships that appeared strained because of the regulatory decisions by the commission. Commissioner Daniels suggested that Mike Williams was retained because Executive Director Todd Lang believed that, "They had a bad relationship with the Governor's office after going after Governor Napolitano on a clean election's issues" (Daniels Dep., p. 267.) The fact that CCEC retains legislative counsel to rebuild relationships with policymakers that they regulate in order to protect their organizational needs certainly creates the appearance of impropriety.

The presence of a lobbying effort from a campaign regulatory agency creates the potential for questions from both traditional and publicly financed elected officials that there may be a relationship between the policy positions they take on election issues and their future regulatory treatment. Unlike other election regulatory agencies, the CCEC is the only agency that provides compensation to candidates as part of their statutory responsibility. It is also the only agency that can remove elected officials from office through regulatory enforcement. The perception

that there may be an inherent conflict of interest in lobbying those very same elected officials is augmented by the fact that many of the decisions that the CCEC are required to make in awarding matching funds are highly subjective.

The matching funds provisions of the Act place the CCEC in the difficult position of ascertaining whether a communication activity is "express advocacy" and the extent to which a candidate may need compensation, which its staff and members concede is something over which reasonable minds may disagree. (CCEC Dep. (McGee), pp. 164-65, 172:8-23, 185-86, 187:21-24, 188:3-9.) To accurately make these determinations, the CCEC must ascertain both the context in which the expenditure was made, including how it may be received by constituents, and the intent of the contributor. But the CCEC does not attempt to determine how constituents feel about the communication in question. (CCEC Dep. (McGee), p. 192:2-11.) The CCEC relies on the statements of the candidate who stands to gain from matching funds without a concern about bias. (CCEC Dep. (McGee), pp. 193-94.) As a result, the CCEC's decisions about express advocacy are highly subjective. The CCEC relies on very few written standards when attempting to determine whether or not matching funds should be awarded; their standards are essentially limited to the Act, the regulations themselves and a handful of outdated procedures manuals that do not provide step-by-step instruction. (CCEC Dep. (Ruiz), pp. 76-79, 130:15-25, 131:1-2; CCEC Dep. (McGee), pp.

161:18-25, 162:1-24, 185-86; Daniels Dep., p. 53:10-14, 189:12-19.) The lack of detailed evaluation criteria allows the CCEC a great deal of discretion in making matching funds awards. And the evidence in this case indicates that the CCEC has repeatedly awarded funds even to candidates who did not request them. (Daniels Dep., pp. 214:23-25, 215: 1-10, 218-20, 242, Exs. 9, 11, 12, 13.) The CCEC also has no written appraisal standards for evaluating the monetary value of challenged or unreported expenditures and has no concern about bias when asking for the value of expenditures from vendors of a candidate who stands to benefit from the award of matching funds. (CCEC Dep. (McGee), pp. 182:11-19, pp. 193-94:9-15; CCEC Dep. (Ruiz), p. 93:4-9.) Especially in the fast moving context of an election, this can and has resulted in exorbitant awards of matching funds to participating candidates.

The fact that the CCEC apparently believes that its efforts are public spirited and can't imagine why its lobbying activities would have the appearance of corruption (*see* CCEC Dep. (Lang), pp. 310-13) is not unique and hardly immunizes the agency from an appearance of corruption. From my experience, very few special interests regard their efforts as wholly self-interested and many special interests are non-profit entities that perceive themselves as wholly devoted to the public interest. These beliefs do not alter how others may perceive them. Based on my academic study of interest groups and my professional representation of them, the subjective nature

of the CCEC's matching funds decisions and its role as one of chief regulators and financiers of campaigns, when combined with the CCEC's substantial lobbying activities of the very people it both funds and regulates, has the net effect of creating the appearance of corruption, if one posits that the appearance of corruption arises merely from creating a relationship where candidates and legislators may feel financially beholden to an interest group.

(c) Basis No. 3: Arizona's system of low contribution limits is already adequate. If one of the goals of Arizona's campaign system is to limit the appearance of corruption attributable to financial influence, strong disclosure mechanisms combined with stringent campaign contribution limits are sufficient provisions at reducing the appearance of corruption regardless of the existence of public financing and the associated matching funds. In fact, in this regard, Arizona is already one of the most stringently regulated states. (I have attached as Osborn Exhibit 13 a genuine copy of the Witko, 2005 article.)

In terms of campaign finance disclosure requirements in 2002, Arizona was rated as having the 5th most stringent disclosure mandates in the nation and was rated as the most stringent state in terms of campaign contribution limitations. (Osborn Exhibit 13, p. 303.) Moreover, according to the recently revised report from the National Conference of State Legislatures (2009) only Colorado ($200 per legislative candidate); Maine ($250 per legislative candidate);

and Montana ($160 per legislative candidate) have lower contribution limitations for legislative candidates. A handful of other states including Massachusetts ($500 for individuals and $200 for lobbyists); and Connecticut ($250 for House races and $1,000 Senate races) have similarly low contributions with some variation. (I have attached a genuine copy of the foregoing report as Osborn Exhibit 14.)

Arizona has both an individual limit on contributions and a collective restriction on the total amount of contributions that an individual can give to all candidates. Under A.R.S. §§ 16-905 (J) and 16-941, individuals during the 2008 election cycle had an individual contribution cap of $390 per state traditional legislative candidates and committees, and a collective contribution cap of $5,850 that individual donors can give to all state traditional legislative candidates and committees who give to candidates or PACs. PAC contributions to traditional legislative candidates are limited to $390 per candidate and "Super PACS" are limited to $1,600 per candidate. Traditional candidates are limited to $12,920 in the aggregate from all PACs other than political parties. These provisions restrict individuals and groups from consolidating large amounts of donations across multiple races. Furthermore, Arizona has an aggressive disclosure law, A.R.S. § 16-915, which requires candidates who receive political contributions in excess of $25 individually disclose the level of the contribution and the name of contributor. In addition, the campaign must disclose all of the

political action committee contributions that a candidate receives. As part of the disclosure requirements, all candidates must report an itemized list of disbursements made during the campaign. These documents are made available electronically so the public and can easily view the source of funding for any candidate as well as the expenditures that each candidate makes. This type of sunshine requirement, when combined with low contribution limits, provides a strong deterrent against the appearance of corruption.

Although the bundling of campaign contributions is a possibility under Arizona's existing system of low contribution, it is unclear how this possibility could affect the behavior of elected officials or whose influence bundling might convey. In my professional experience as a lobbyist and political campaign consultant in Arizona, bundling most often occurs at fundraising events where competing interests are in attendance. Under those circumstances, it is unrealistic to believe that these contributions create disproportionate influence for a specific contributing individual or group. It is equally plausible that bundling of such competing interests tends to diminish any financial influence of any particular contributor in that each may appear fungible to the candidate. For this reason, there is enough uncertainty over the influence of bundlers over traditional candidates to justify maintaining the current regulations. But if it could be demonstrated that bundling is problematic for traditional candidates in Arizona,

there are more focused and direct remedies than the matching funds components of the Clean Elections Act to address any concerns. The remedy for such concerns is not to provide matching funds that deters speech but to enhance the regulation of the collection of contributions through increased disclosure on bundlers or other regulatory provisions that restrict the bundling of contributions. Such an approach would tighten an already strong campaign regulatory system without creating the external ramifications of the matching funds components of the Clean Elections Act. Moreover, to the extent that bundling is said to enhance the influence of the bundler, the public financing provisions of the Clean Elections Act, as they are currently devised, is in no way immune from such influence. In fact, the matching funds component would appear to enhance such influence.

Currently, the Clean Election Commission allows bundling of seed money for participating candidates as well as $5 contributions so long as the bundlers are not compensated for their effort. (CCEC Dep. (Lang), p. 260:22.) Of course, bundling of qualifying contributions occurs in the Clean Elections system, and questions about the actual volunteer status of Clean Elections bundlers have been raised before the Commission in the past. As with the private campaign finance system, there is no prohibition or limitation on the bundling activities of lobbyists, political consultants or special interests. But unlike the private campaign finance system, the Clean Election Act's statutory requirement to collect signatures

and five dollar contributions to qualify for public financing requires a sizable effort in the early portions of the campaign when there are few resources to finance it.

Based on my experience as a political campaign consultant in Arizona, I believe to a reasonable degree of professional certainty that the large number of $5 contributions that are mandated under the Act (as of 2008, 4,410 Governor's Office, 2,755 Secretary of State, 1,650 Corporation Commission and 220 for the Legislature) require significant effort from participating candidates or supporting organizations. Not only that, the requirement to collect these contributions occurs when campaigns are greatly limited by the seed money participating candidates can use to fund their collection efforts. The bundling loophole for publicly funded candidates, therefore, provides a unique opportunity for special interests with large membership bases to collect these contributions and provide an enormous service to the campaign at a time when it the campaign's financial resources are most limited.

It is obvious that the value of the bundler's services to the participating candidate is not just the seed money or $5 contributions they furnish, but access to public financing, including both the lump sum component and the matching funds component, which can triple the initial lump sum. Political campaign consultants and candidates in Arizona generally understand and fully appreciate that anyone who can bundle all or a significant portion of the

qualifying contributions are effectively giving a participating candidate both the nominal value of the contributions and a line of credit for the full amount of public financing. And the financial influence of effective bundlers can only be enhanced by the fact that participating candidates are largely limited to one source of campaign financing and must qualify for that financing in a compressed time frame. In my experience as a lobbyist and political campaign consultant in Arizona, bundlers just do not have this degree of financial leverage over viable traditional candidates, who, absent the threat of matching funds, are typically able to raise campaign funds at a variety of times and from a variety of disparate sources.

The possibility of bundling under the existing regulatory system in no way warrants the Act's matching funds component from the perspective of the goal of preventing corruption or the appearance of corruption. And in revisiting the question of whether Arizona's campaign finance system without the matching funds component of Clean Elections is stringent enough to prevent that appearance of corruption, the answer remains yes. Arizona's system combines low contribution limits with an extensive set of disclosure requirements as they relate to both contributions and expenditures. Based on my professional experience as a lobbyist and political consultant, in which I have observed firsthand the impact of private campaign finance contributions on numerous campaigns in Arizona and the subsequent behavior of elected officials, I believe to a reasonable

degree of professional certainty that the combination of public disclosure mandates and campaign contribution limits prevent concentrations of expenditures from corrupting elected officials or creating the appearance of corruption. And this, in turn, implies that the availability of matching funds adds nothing to the regulatory system that could prevent such corruption or the appearance of such corruption, even if matching funds somehow had an anti-corruption effect (which I deny given the gaming strategies discussed in the next section). Indeed, the fact that the CCEC has been actively lobbying members in the current session to amend the Clean Elections Act to eliminate its matching funds component and replace it with massively increased contribution limits for both participating and traditional candidates strongly suggests agreement with my finding that there is no substantial connection between private campaign contributions, much less matching funds, and preventing corruption or the appearance of corruption. (CCEC Dep. (Lang), pp. 270-308, Ex. 30.)

(c) [sic] **Basis No. 4: The matching funds component enables and has resulted in various gaming strategies.** The matching funds component of the Citizen's [sic] Clean Election Act creates opportunities for candidates and political consultants to manipulate the system in order to create fundraising advantages in ways that foment deception and effectively bypass contribution limits. The New Times article, "The Dirty Truth About Clean Elections," attached as Osborn Exhibit

8, accurately evidences the reputation the Clean Elections system currently has among knowledgeable members of the public and most political consultants in Arizona. This reputation results from the historical way in which public financing and matching funds have been triggered under the Act. Based on my professional experience as a political campaign consultant, so long as matching funds can be triggered in the manner set out in the Clean Elections Act, I am convinced that these opportunities will be and have been seized as depicted in the New Times article. It is unreasonable to think otherwise. Commissioner Lori Daniels puts it very well in her deposition, where she observed, "Politicians, some of them are very clever people, and some of them are very devious people, and they're going to try to find loopholes wherever they can. It's been since the beginning of time." (Daniels Dep., p. 256:19-22.) Below are tactics that can and, in my professional opinion as a political campaign consultant, inevitably will manipulate the matching funds provisions of the Clean Elections Act in ways that replicate and amplify any corruption appearance or effect of private contributions and expenditures.

(1) Teaming. Teaming between traditional and participating candidates is ubiquitous in Arizona's multi-seat elections. This creates an opportunity for individual contributors and political action committees to bypass contribution limits through triggering matching funds. For example, in the primary and general election, they

can cause independent expenditures to be made to support the traditional candidate member of the team, which will trigger matching funds to their equally-favored participating candidate. And during the general election, they can contribute to the traditional candidate member of the team, which will also trigger matching funds to their favored participating candidate. Wealthy traditional candidates can also use their right to make unlimited personal expenditures and contributions to their own campaign to trigger like amounts to their teamed participating candidate(s). Based on the testimony of Paul Newman and Sam George, Sam George's expenditures in the 2008 primary and general election clearly has this appearance. Based on the testimony of Commissioner Daniels, I believe a similar teaming strategy was contemplated and implemented at least in part by Republican candidates during the Corporation Commission race. (Daniels Dep., pp. 100-10.) It is implausible to think that participating candidates, especially those who share campaign strategists, do not know or would not know who actually triggered their funding when this occurs. If traditional candidates are considered beholden to their contributors, then participating candidates must be regarded as beholden to friendly candidates, individuals and organizations who have triggered their access to public financing and matching funds.

(2) Phantom Expenditures.

"Phantom Expenditures" are planned expenditures that never occur in order to either game the system or

because of shifting independent expenditure priorities. It is common to "book" early advertising time on T.V. and radio to secure the best spot times on the best channels. Commonly, media companies require pre-payment before an ad runs but many stations allow for a 48 hour cancelation policy or payment just before the spots are run. The simple booking of media can trigger Clean Election's matching funds. An independent expenditure committee could "book" time which would trigger matching funds and then never execute the buy. A large independent expenditure committee may use polling to track many races and distribute their resources based on late tracking polls. However, to secure the best media options they "book" media they may not use. Or they may attempt to fundraise for the "booked buy" with limited amounts of success and have to withdraw the ads because of a lack of funds. The result of these activities whether designed to trigger matching funds or not, may result in matching funds being distributed inappropriately.

(3) The Pseudo Endorsement Piece. The use of endorsements is common in political campaigns. A "Pseudo Endorsement Piece" is a mail or other campaign medium in which a non-participating or participating candidate working as a team highlights the endorsement and background of their teammate or up ticket supporter with the goal of promoting themselves and more importantly their endorser. While the pseudo endorsement piece will not advocate for the election of the endorsing candidate it highlights the achievements or merits of

that candidate. A participating candidate in a "safe district" where they face little risk of an election loss can use the endorsement piece as a way to further the campaign objectives of the up ticket candidate through the use of their participating funds.

(4) **Reverse Targeting.** "Reverse targeting" is the practice of an independent expenditure committee sending a message that advocates for the candidate's election but uses supporting arguments that are inconsistent with the audience's attitudes or otherwise ineffective. For example, Vote for Conservative Candidate X because he had the Guts to Increase Your Taxes. Through the use of voter identified lists where voters' attitudes have been identified, a message that is designed to attack an opponent will be sent with the goal of both attacking the opponent and triggering matching funds. Such expenditures generate matching funds for a participating candidate aligned with the independent expenditure committee while sending messages that will negatively impact the targeted candidate. In these types of expenditures it will be difficult for the Citizen's [sic] Clean Election's Commission to determine whether or not these were real expenditures in support of a candidate or reverse targeting especially if independent expenditure committees are careful only to devise confusing or ineffective. And on at least four occasions during the 2008 election cycle, independent expenditures were made with the appearance of reverse targeting.

One of these expenditures involved a blast email sent by a gay rights political organization, Equality Arizona, during the 2008 primary, which favorably referenced the candidacy of socially conservative Republican Representative Eddie Farnsworth. (CCEC Dep. (Ruiz), Ex. 3.) Three others involved signs posted during the general election, identifying candidates and stating "they promised to raise taxes help them keep the promise," "re-elect Sen. Meg Cahill reps. Shapria & Ableser help them to support illegals," and "support open borders." (CCEC Dep. (Ruiz), pp. 67-70, 101-10, Ex. 2; Daniels Dep., pp. 181-83, 205-06, Exs. 7, 9.) In each case, a participating candidate opposing the targeted candidate could have received matching funds; and in one case, the participating candidate opposing the targeted candidate actually requested matching funds. These examples illustrate and confirm my professional experience and judgment as a political campaign consultant that reverse targeting routinely occurs and that the Act's matching funds provisions incentivize them. (Daniels Dep., pp. 183:8-21; 188:4-9, 114, 120:24-25, 121.)

I, Marcus Osborn, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this June 11 2009

/s/ Marcus Osborn
Marcus Osborn, Ph.D.

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION GOLDWATER INSTITUTE
Nicholas C. Dranias (168528)
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462 5000 F: 602 256-7045
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH; NANCY MCLAIN; and TONY BOUIE,

Plaintiffs,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

No. CV-081550-PHX-ROS

Hon. Roslyn O. Silver, presiding

DECLARATION OF JEFFREY R. OBER IN OPPOSITION TO DEFENDANTS/ DEFENDANT INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

1. I am over the age of eighteen, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am an intern at the Goldwater Institute as part of my participation in the Koch Summer Fellows Program hosted by the Institute for Humane Studies. I currently attend Arizona State University where I am earning my bachelors in Economics from the W.P. Carey School of Business with a minor concentration in Political Science. I also work as an LSAT instructor for Kaplan Test Prep and Admissions, and have worked for both state and federal government in the past, including the Arizona State Senate.

3. In the course of my work as an intern at the Goldwater Institute, I reviewed candidate expenditures and independent expenditures for the 1998 and 2006 election cycles in order to evaluate the accuracy of Defendant-Intervenor's claims regarding candidate expenditures and also that the total amount of independent expenditures made in 1998 was $29,746.85 (or $36,791.20 in 2006 dollars) and that the total amount of independent expenditures made during election cycles in Arizona increased 3,300% to $1,262,976.95 between 1998 and 2006 (*see* Migally Dec., p. 4). My investigation revealed that the Defendant-Intervenor's claim regarding independent expenditures was false and that its claims regarding candidate expenditures are misleading.

4. As discussed below, the relevant campaign finance records maintained by the Arizona Secretary of State establish that Defendant-Intervenor grossly understated the amount of independent expenditures during the 1998 election cycle and, consequently, wildly overstated the growth in independent expenditures between 1998 and 2006. In 2006 dollars, the total amount of independent expenditures has increased not 3,300%, but no more than 253% concurrently with an approximate 32% increase in the state's population. This is in comparison to national growth in political action committee expenditures of approximately 191% against a backdrop of an estimated 8% increase in national population. Additionally, in the course of my investigations, I determined that average per capita candidate expenditures by privately-funded candidates of major parties *declined* between 1998 and 2006. I determined that the average expenditures made by legislative candidates whose aggregate spending was in the top ten percent have *declined* in 2006 dollars for the primary election period between 1998 and 2006, despite the aforesaid population increase. Finally, based on candidate expenditure data from 2006, I determined that matching funds has had the effect of enabling participating candidates to vastly outspend traditional candidates.

The Truth about Independent Expenditures from 1998-2006

5. As discussed in Ms. Migally's Declaration, Defendant-Intervenor used only two sources to compile its list of independent expenditures: the online reports of Independent Expenditure Committees (available at http://www.azsos.gov/cfs/CommitteeSearch.aspx), and the online reports of Separate Segregated Funds Committees (also available at http://www.azsos.gov/cfs/CommitteeSearch.aspx) Accordingly, I proceeded to review those websites for information regarding the amount of independent expenditures during the 1998 election cycle. When reviewing the entirety of Independent Expenditure Committees and Separate Segregated Funds Committees online, I immediately discovered the large number of entries that read "$0.00" for all categories (attached hereto as Exhibits 1 and 2 are genuine copies of the related printouts from the indicated Secretary of State website). This suggested to me the possibility that the online data relied upon by Defendant-Intervenor for the 1998 election cycle was incomplete.

6. Investigating further, I found that according to the 1998 annual report of the Secretary of State of the State of Arizona (a genuine copy of which is attached as Exhibit 3), there were 184 electronic filings of campaign finance reports, compared with 848 Non-Candidate Political Committee Campaign Finance Reports that were submitted as hard copies. Moreover, I discovered that mandatory electronic

filing did not take place until 2000, with the passage of A.R.S. 16-916.01. Thus, for the vast majority of Committees that read "$0.00" on the Secretary of State's website, it seemed increasingly likely that this was due to a lack of electronic filing, rather than an actual amount of "$0.00" in spending.

7. Additionally, there are several problems with the categorization of spending in the existing online reports from 1998. For example, the online report for AZ Rock Products Assn PAC listed contributions to candidate committees during the 1998 election cycle under its independent expenditures category (a genuine copy of which is attached as Exhibit 4). Similarly, the online report for AZ Citizens For Excellence in Government identified at least $72,049 in expenses such as "direct mail costs," "phone bank costs," and "GOTV Signs & Phones" as operating expenses during the 1998 election cycle, even though such expenditures appear more likely to be independent expenditures (a genuine copy of which is attached as Exhibit 5). And these two online reports were not alone in containing possible misclassifications of expenses. Without detailing every instance of these occurrences, I noticed possible online reporting errors involving the miscategorization of operating expenses and independent expenditures in the financial filings of Altria Group Inc, PAC, AZ League of Conservative Voters, AZ Nurses Assn PAC, ISEW Local Union 266 PAC, Lewis & Roca Partners' PAC, and Tucson Firefighters Local #479 Fire PAC.

8. As I was becoming increasingly convinced that the online data for the 1998 election cycle was both incomplete and inaccurate regarding independent expenditures, I next investigated Defendant-Intervenor's claims regarding supposed increases in candidate spending since the inception of the Act. After examining the online electronic candidate expenditure records for the 1998 election cycle, I counted 32 races (both state Senate and state House of Representatives) in which the candidate committees' reported expenses were either completely missing or were obviously incomplete (a genuine copy of related printouts from the Secretary of State's campaign finance database is attached as Exhibit 6).

9. Upon concluding that the records available online and relied upon by Defendant-Intervenor were incomplete and inaccurate, I submitted a public records request to the Secretary of State in order to examine the hard copies of the filings for candidate expenditures and independent expenditures submitted in 1998 (a genuine copy of which is attached as Exhibit 7).

10. On June 30, 2009 and on July 1, 2009 pursuant to my request for inspection under Arizona's public records law, the Arizona Secretary of State produced records of candidate expenditures and independent expenditures for the 1998 election cycle. Accordingly, on the same days, I travelled to the Secretary of State's office at 1700 W. Washington, 7th Floor, Phoenix, AZ to inspect the produced documents. The records were furnished in 36 bankers

boxes, with campaign finance reports for candidates contained in bankers boxes numbered 1 through 10 and campaign finance reports for political action committees and independent expenditure committees contained in bankers boxes numbered 1 through 27, with the omission of box 19.

11. Each of the 36 boxes furnished for my inspection had at least 1000 pages of documentation in it, so I proceeded to review at least 36,000 pages of material to determine the reported amounts of independent expenditures and candidate expenditures. I was joined by Michael Clancy, a law student at Phoenix Law School and also a Goldwater Institute intern, who worked under my direction examining campaign finance reports and reporting to me the amounts that were reported for independent expenditures and candidate expenditures during the 1998 election cycle.

12. Based on my review on June 30 and July 1, 2009, I have summarized the data contained in the voluminous public records produced by the Arizona Secretary of State in two spreadsheets, which are attached as Exhibits 8 and 9.

13. Exhibit 8 summarizes reported independent expenditures by the designated political action committees for the 1998 election cycle. The first column "Box" indicates the box in which the respective committee's filings were found. The second column "Committee" identifies the political action or independent expenditure committee on the hardcopy filing I

reviewed. The third column "Independent Expenditures" lists the total amount of expenditures obtained from the "independent expenditures" line item on each hardcopy report of each respective committee for the post-general election period.

14. As shown in Exhibit 8, I found that independent expenditures totaled at least $289,198.73 (or $357,683.83 in 2006 dollars using the same inflation calculator utilized by Defendant-Intervenor) during the 1998 election cycle. This is nearly 10 times what Defendant-Intervenor represented under penalties of perjury in Ms. Migally's declaration. This number is a minimum amount because I believe the missing box 19 contained additional evidence of independent expenditures that the Arizona Secretary of State did not provide to me.[1]

15. Therefore, the real percentage increase in independent expenditures between 1998 and 2006

---

[1] Although the Secretary of State's office had previously represented that it would make all 37 bankers boxes of documents available for inspection pursuant to my records request, one of the boxes (box 19) was not furnished and was represented as missing. Based on the aforesaid sequence of the boxes, in which records relating to independent expenditures were kept in boxes numbered 1 through 27, it is my inference that box 19 would have contained records related to independent expenditures, rather than records of candidate expenditures (which were located in boxes numbered 1 through 10). Therefore, the total reported for independent expenditures during the 1998 election cycle should be considered as a minimum number.

was not 3,300%, but *at most* 253.1%.[3] At the same time, the state's population increased by 32.37% according to data published online by the U.S. Census Bureau,[4] the state government's budget grew by 106.21%,[5] and the Federal Elections Commission reports that PAC expenditures across the country grew 191.48% between 1998 and 2006 (in 2006 dollars),[6] even though the percentage increase in population for the nation during the same time was just over 8% based on data published online by the U.S. Census Bureau.[7]

16. Per capita growth in Independent Expenditure spending in Arizona lagged per capita growth

---

[3] A percentage increase calculator is available here: http://www.marshu.com/articles/calculate-percentage-increase-decrease-percentcalculator.php (last visited July 2, 2009).

[4] *Compare* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2008_EST&-format=US-40S *with* http://www.census.gov/population/estimates/state/st-99-1.txt (last visited July 2, 2009).

[5] *Compare* http://ftp2.census.gov/govs/estimate/06s1sstab1a.xls *with* http://ftp2.census.gov/govs/estimate/98st1ss1.xls (last visited July 2, 2009).

[6] *Compare* http://www.fec.gov/press/pac18lng.htm *with* http://www.fec.gov/press/press2007/20071009pac/20071009pac.shtml (last visited July 2, 2009).

[7] *Compare* http://www.census.gov/popest/archives/1990s/nat-total.txt *with* http://www.census.gov/popest/states/tables/NST-EST2006-01.xls (last visited July 2, 2009).

in PAC spending nationally by 33 percent between 1998 and 2006.

The Truth about Candidate Expenditures in Arizona

17. Exhibit 9 summarizes reported legislative candidate expenditures for the 1998 election cycle, as evidenced by the hardcopy campaign finance reports I reviewed on June 30, 2009 and July 1, 2009. The first column "Box" indicates the box number in which the respective candidate committee's filings were found. The second column "Candidate Name" identifies the candidate committee on the hardcopy filing I reviewed. The third column "Total Spending" lists the total amount of expenditures reported by the candidate committee on their post-general election report. The fourth column "Primary Spending" lists the amount of expenditures reported by the committee on their post-primary election report. The fifth column "General Spending" lists the amount of expenditures for the respective committee during the general election period based on the difference between the amount in the third and fourth columns.

Per-capita PAC spending for 1998 (in 2006 dollars) $361,947,290/271,387,000 = 1.334. Per-capita PAC spending for 2006: $1,055,000,000/299,398,484 = 3.524. Percentage change is 198%. Per-capita Independent Expenditure spending in AZ for 1998 (in 2006 dollars): $357,683.83/4,667,277 = 0.077. Per-capita Independent Expenditure spending in AZ for 2006: $1,262,976.95/6,178,251 = 0.204. Percentage change is 164.9%. Difference in percentage changes is 198% – 164.9% = 33.1%.

The sixth column "Office Sought" lists the office sought by the respective candidate committee based on the office identified as being sought by the candidate committee on their hardcopy reports[*] (SS means "State Senator," SR means "State Representative," and the hyphenated number following these abbreviations identify the respective legislative district).

18. As shown in Exhibit 9, I found that the total amount of expenditures by the 180 legislative candidates (whose sought-after office I could identify and who actually reported campaign expenditures) was $3,229,520.83 (which is $3,994,303.06 in 2006 dollars using the same inflation calculator as Defendant-Intervenor (available at http://data.bls.gov/cgi-bin/cpicalc.pl)). The average amount spent by these legislative candidates during the 1998 election cycle

---

[*] A handful of candidate committee reports did not identify the office being sought. In those cases, to determine the office sought by the candidate committee, I supplemented my review of hardcopy filings with a review of the Secretary of State's primary election canvass for 1998 (available at http://www.azsos.gov/election/1998/Primary/Canvass1998PE.pdf), the Secretary of State's general election canvass for 1998 (available at http://www.azsos.gov/election/1998/General/Canvass1998GE.pdf), and the 1998 electronic candidate committee reports (as mentioned above). Even after supplementing my review, there were five candidates that I could not determine which office they were running for. I ignored these for the purposes of my calculations, as I could not be sure if they were in fact legislative candidates and not statewide candidates. The candidates I excluded from my calculations are indicated by the phrase "could not determine" in the sixth column of Exhibit 9.

was $17,941.78, which is $22,190.57 in 2006 dollars. However, by omitting spending by write-in candidates and legislative candidates of non-major parties, and summing only the expenditures of the resulting 169 major party candidates, I found that the total amount of expenditures by major party legislative candidates was $3,165,222.77 (which is $3,914,778.59 in 2006 dollars), and the average amount of major party legislative candidate expenditures during the 1998 election cycle was $18,729.13 (or $23,164.37 in 2006 dollars using the same inflation calculator utilized by Defendant-Intervenor).

19. Following my analysis of the 1998 expenditures, I turned my attention to the expenditures provided for 2006. Using the Secretary of State's website I determined who ran in the 2006 Primary election and in what districts (http://www.azsos.gov/election/2006/Primar/Canvass2006PE.pdf) and then who went on to compete in the 2006 General election (http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf).

20. Detecting no obvious omissions or classification errors in the voluminous online data from the 2006 election cycle (unlike in the 1998 online data), I proceeded to construct a spreadsheet with the above information, as well as party affiliation and whether or not each candidate participated in the publicly funded aspect of the Act, which I found at http://www.azcleanelections.gov/Libraries/2005-2006-docs/2006/Primary_Election.sflb.ashx. (Attached hereto as Exhibit 10 is the related spreadsheet).

21. Then, again using the Secretary of State's website, I added the total election expenditures, primary election expenditures, and general election expenditures figures for each candidate to the same spreadsheet (http://www.azsos.gov/cfs/CommitteeSearch.aspx and using the "Candidate Name" field). Finally, a simple sum function in Microsoft Excel allowed me to add the expenditure totals for candidates participating in the publicly funded aspect of the Act and those using traditional funding for both the primary election and the general election. And once I had the sums of each category, simply dividing by the number of participating candidates and the number of traditional candidates gave me the average spending by each type of candidate.

22. Accordingly, the first nine columns of Exhibit 10 are self-explanatory and based on the identification, classification and spending data furnished by the Arizona Secretary of State's and the Citizen's [sic] Clean Elections Commission's online websites [sic]. The tenth column "Traditional Candidate facing a Participating Candidate in Primary" contains either a "p" or an asterisk. The asterisk signifies if the traditional candidate faced one or more participating candidates in their primary election and the adjacent "p" identifies the participating candidate(s) they faced. Similarly, the eleventh column "Traditional Candidate facing a Participating Candidate in General" column contains either a "p" or an asterisk. The asterisk signifies if the traditional candidate faced one or more participating candidates

in their general election and the adjacent "p" identifies the participating candidate(s) they faced.

23. I discovered first that the real amount of legislative candidate expenditures by privately-funded major party candidates has increased on average since the enactment of Clean Elections. In particular, I found the average total spending for major party (non-write-in) traditional candidates for the 2006 election cycle was $28,806.84, which is more than the $23,164.37 in 2006 dollars spent by major party (non-write-in) candidates during the 1998 election. However, major party (non-write-in) traditional legislative candidate spending on average per capita in 1998 was $0.0050, but fell to $0.0047 in 2006. This is a decrease of six percent in average per capita spending since 1998.

24. As shown in Exhibits 9 and 10, the actual average inflation-adjusted primary election spending (in 2006 dollars) by the top ten percent highest spending legislative candidates declined from 1998 to 2006, from $63,928.21 in 1998 to $62,453.74 in 2006. And the actual average inflation-adjusted (in 2006 dollars) general election spending by the top ten percent highest spending legislative candidates was $40,354.05 in 1998 and $46,685.08 in 2006.

25. Next, I found that awards of Matching Funds have resulted in the average participating candidate outspending the average traditional candidate in the 2006 election cycle, regardless of the mix of candidates.

26. As shown in Exhibit 10, considering all legislative candidates running for office during the 2006 primary election, participating legislative candidates spent an average of $21,860.06 while traditional candidates spent $17,026.73. Participating candidates thus outspent traditional candidates on average by nearly $5,000 during the 2006 primary election. In the 2006 general election, participating legislative candidates spent an average of $20,648.09, compared to $8,823.38 for traditional candidates. Participating candidates thus outspent traditional candidates by nearly $12,000 on average during the 2006 general election.

27. As shown in Exhibit 10, even considering only those races in which a major-party traditional candidate had faced at least one major-party participating candidate (excluding races in which minor parties were the only competition), I found that participating candidates outspent traditional candidates on average by nearly $3,000 during the primary election and by nearly $7,000 during the general election. Specifically, during the 2006 election cycle, I found: a) primary spending by a major-party traditional candidate facing at least one major-party participating candidate was on average $27,278.35; b) primary spending by a major party participating candidate facing at least one major party traditional candidate was on average $30,104.05; c) general spending by a major party traditional candidate facing at least one participating candidate was on average $15,376.41; and d) general spending by a

major party participating candidate facing at least one major party traditional candidate was on average $22,114.42.

28. As shown in Exhibit 10, considering only those races in which no traditional candidate spent more than $70,000 (i.e. races in which traditional candidates could not have outspent the matching funds cap), I found major party participating candidates on average outspent major-party traditional candidates by more than $11,000 during the primary election, and that major party participating candidates on average outspent major party traditional candidates by more than $10,000 during the general election. Specifically, I found: a) primary spending by a major-party traditional candidate facing at least one major-party participating candidate was on average $16,379.46; b) primary spending by a major-party participating candidate facing at least one major-party traditional candidate was on average $27,390.52; c) general spending by a major-party traditional candidate facing at least one major-party participating candidate was on average $10,082.37; and d) general spending by a major-party participating candidate facing at least one major-party traditional candidate was on average $20,333.42.

I, Jeffrey Raymond Ober, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 14th day of July, 2009.

/s/ Jeffrey Ober
Jeffrey Raymond Ober

Chain of Custody Declaration of Nicholas C. Dranias

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Chain of Custody Declaration.

2. Attached hereto are genuine copies of email correspondence dated June 23, 2009 and July 6, 2009 between myself and Attorney Tanja Shipman (representing the Arizona Secretary of State), which I personally printed from my office Outlook inbox. They represent printouts of documents kept and maintained accurately in the ordinary course of my business and within the scope of my responsibilities as an employee of the Goldwater Institute.

3. The emails establish that the boxes of documents reviewed by Mr. Ober were produced by the Arizona Secretary of State as kept in the ordinary course of business and that the documents will be preserved by the Secretary of State for inspection by the parties during the pendency of the litigation.

I, Nicholas C. Dranias, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the

United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 14th day of July, 2009.

/s/ Nicholas C. Dranias
Nicholas C. Dranias

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION GOLDWATER INSTITUTE
Nicholas C. Dranias (168528)
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462 5000/F: 602-256-7045
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE, Plaintiffs, v. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants.	No. CV-081550-PHX-ROS Hon. Roslyn O. Silver, presiding **REBUTTAL DECLARATION OF TONY BOUIE IN SUPPORT OF SECOND MOTION FOR PRELIMINARY INJUNCTION**

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I had originally filed to run for state representative in the 2010 election cycle, as indicated in my prior declaration filed in support of Plaintiffs' motion for summary judgment. The two opposing primary candidates were a traditional candidate and a known participating candidate in previous cycles. The known participating candidate is current Senator Jack Harper, who could not declare an official candidacy due to the "resign to run" law. Constantine Querard is running the campaigns of both house candidates, raising the risk the gaming tactic used against me last cycle would be used again. This is because Querard also ran the campaign Carl Seel, one of my opposing primary candidates in the 2008 cycle. Therefore, I registered my candidate committee to run for a state senate seat in December 2009.

3. I so greatly fear the punitive effects of the possibility of matching funds being triggered in the 2010 election cycle for one or more opposing candidates that I have chosen to run for an office that, in my judgment, minimizes their likely adverse impact on my campaign message. Accordingly, my current intention to run for the state senate is the product of duress attributable to the threat of matching funds funding hostile speech against me, my candidacy and my supporters. I will continue to be feel such duress

and the deterrent effect of matching funds on my choice of candidacy as well as on my campaign fundraising and expenditures, as averred in my declaration in support of Plaintiffs' motion for summary judgment, until and unless matching funds are struck down.

I, Tony Bouie, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 12th day of January, 2010.

/s/ Tony V. Bouie
Tony Bouie

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION GOLDWATER INSTITUTE
Nicholas C. Dranias (168528)
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462 5000 F: 602-256-7045
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, et al., Plaintiffs, v. KEN BENNETT, et al., Defendants	No. CV-081550-PHX-ROS Hon. Roslyn O. Silver, presiding **REBUTTAL DECLARATION OF TONY BOUIE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. It is my understanding that Defendants have relied upon my pre-primary and post-primary campaign finance reports in an attempt to cast doubt over my statement that "I also spent no more than $550

promoting my campaign between August 5, 2008 and August 26, 2008, despite having approximately $10,000 to spend promoting my campaign during that same time frame."

3. Defendants are misleading the Court. As they should know, the dates shown in expenditure reports have no necessary connection to the timing of any related promotional campaign. I reported campaign expenditures before, on or after the actual promotion occurred depending on when I learned of the expenditure or the binding obligation to make the expenditure. This is because when I hired my campaign consultants, I initially gave them broad direction or authority to conduct campaign promotional efforts independently from my direct involvement. This meant that there were times in August 2008 that I learned of campaign expenditures or the binding obligation to make campaign expenditures after, on or before they were actually made *as well as* after, on or before the related promotional effort took place. Also, any report of expenses for consulting services would necessarily be long after the services were rendered because the cost of such services was, in substantial part, a function of the contributions that resulted from their efforts, and I would have no way to ascertain my liability for consulting services in advance of the services being rendered. Consequently, although I would promptly report any campaign expenditure I made or incurred when I learned of them, the dates on which I reported campaign expenditures would have no necessary connection to

the date on which the related promotional efforts would take place. It is inexplicable to me that Defendants would suggest otherwise.

4. As I stated in my original declaration, on or about August 13, 2008, I made a decision to minimize and delay campaign expenditures after seeing the full impact of Matching Funds against me. And, after reviewing my campaign records, I am certain my committee spent no more than $550 on campaign promotional efforts that took place between August 5, 2008 and August 26, 2008. My certainty on this is based not only on the fact that I made the decision to minimize such expenditures, but also based on my clear recollection as contemporaneously recorded in the attached chart.

5. Between July 1, 2008 and September 5, 2008, I created and updated an excel spreadsheet to track hits and page views on my campaign website against all of my campaign promotional efforts at or about the time they occurred as part of my normal campaign business. This document was not created for litigation purposes. Moreover, I obviously wanted the information to be accurate to give me a sense of when my promotional efforts were actually occurring and how effective they were in terms of webpage hits and views. I have attached the graph that I generated from my spreadsheet, to which I added promotional activities by my campaign, the campaigns of my opponents and of third parties. The numbers on the right hand side specify the number of "hits" and "page" views. And the dates reflected for each

promotional item identified (i.e. those marked with the word "Bouie #X Drop") reflect the dates in August 2008 on which I knew promotional efforts *actually occurred*.

6. As shown in the attached chart, the only promotional activity for my campaign that took place between August 5 and 26, 2008 of which I was aware at the time was a portion of "Bouie mailer number 4" on August 6, 2008 (which was likely mailed on or before August 5, 2008). I have no reason to believe this chart is inaccurate. Accordingly, I believe that the attached spreadsheet accurately reflects the full extent of my campaign promotional activities between August 1 and 31, 2008, apart from incidental activities such as the maintenance of a campaign committee or meeting with voters.

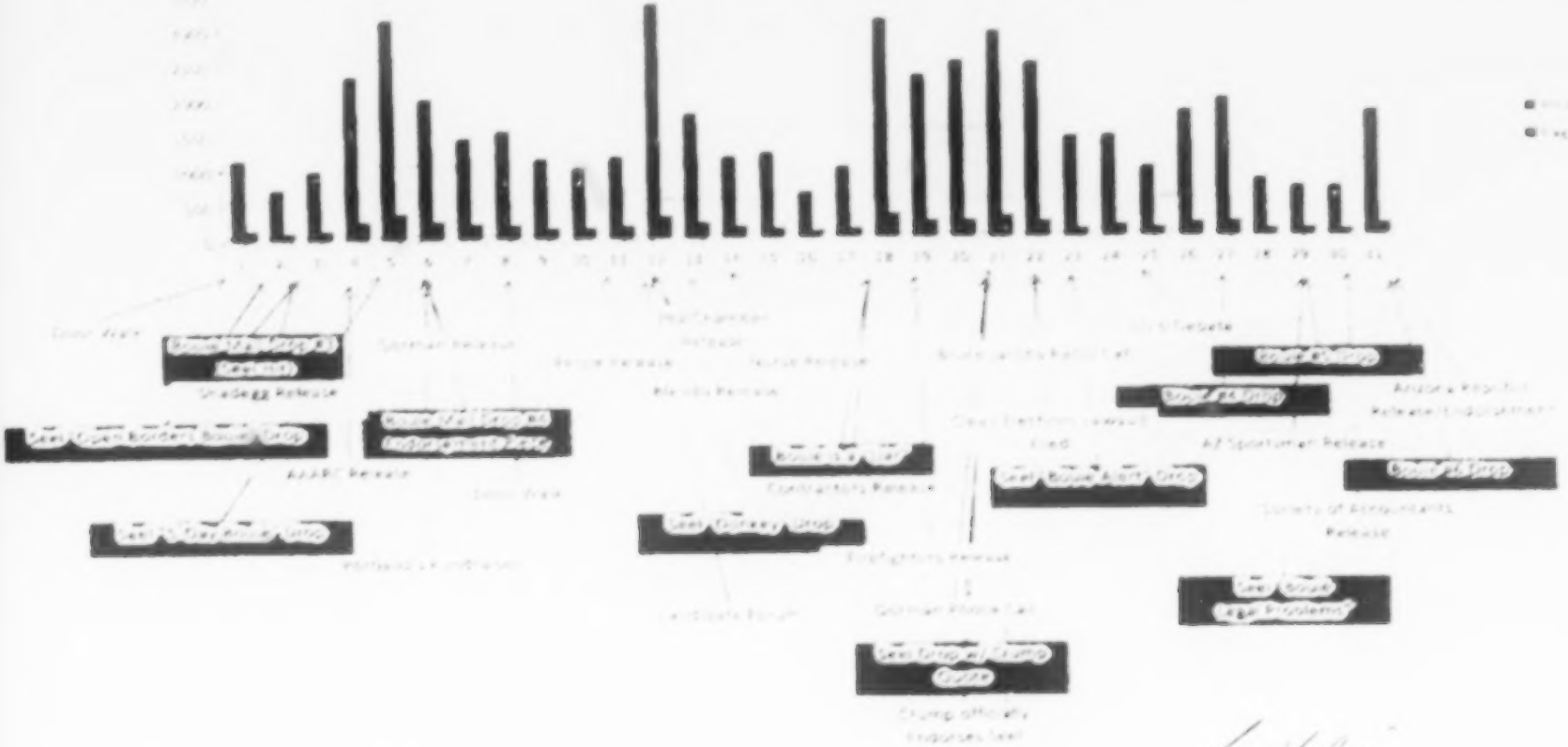
7. I remain certain, even if one includes incidental costs related to maintaining a campaign or meeting with voters, that the total amount of expenditures for my campaign's promotional activities between August 5 and 26, 2008 could not be more than $550. Moreover, the breakup of Bouie mailer number 4, with a portion dropped on or about August 6th and a portion dropped on or about August 27th, is consistent with my recollection that I decided to delay further promotional efforts until the end of the primary as I came to fully appreciate the adverse impact of Matching Funds on my campaign.

I, Tony Bouie, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United

States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this July 24, 2009.

s/ Tony V. Boue
Tony Boue



BEST AVAILABLE COPY

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION GOLDWATER INSTITUTE
Nicholas C. Dranias
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462 5000/F: 602-256-7045
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, AND TONY BOUIE, Plaintiffs, v. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants.	No. CV-081550-PHX-ROS Hon. Roslyn O. Silver, presiding **DECLARATION OF TONY BOUIE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I have been a candidate for Arizona State House of Representatives, Legislative District 6, for the primary election. I was born and raised in New Orleans, Louisiana. I went to college at the University of Arizona as a student-athlete, ultimately receiving a Master's Degree in Language, Reading and Culture in 1997. I was a professional football player with the National Football League from 1995 until 1999, for four seasons. I received my Master of Business Administration degree from Arizona State University in 2005. I am a small business owner.

3. During the 2008 election cycle, I began my candidacy when I registered with the Arizona Secretary of State on April 14, 2008 as a traditional, privately-funded candidate.

4. Due to my participation in this litigation, I am now very familiar with the rules and regulations of the Arizona Citizens Clean Elections Commission. Based on my current familiarity with the Clean Elections Act and my compliance with the reporting requirements of the Act during the 2008 election cycle, my understanding of the way the "matching funds" provision of the Clean Elections Act operate during the primary and general election season is as follows.

5. There are two components of the "matching funds" provision of the Act during the primary election season. The first component gives to a candidate who is participating in the subsidies furnished by the Act ("participating candidate"), an amount of money equal to the reported (or unreported but discovered) expenditure of any independent party, such as a political action committee, in support of any traditional candidate's campaign or against that participating candidate's campaign. The second component gives to a participating candidate an amount of money equal to the reported (or unreported but discovered) expenditure of any competing traditional candidate campaign committee in support of the traditional candidate's campaign or against that participating candidate's campaign, less six percent and any early private contributions that the participating candidate may have obtained from individuals, including registered lobbyists, as authorized under section 16-945 of the Act. Both matching funds components are triggered for a participating candidate once the sum of independent expenditures in opposition to that participating candidate, independent expenditures in support of any traditional candidate, direct expenditures in support of any traditional candidate, and direct expenditures in opposition to that participating candidate exceeds a certain threshold amount for that participating candidate, which the Commission specifies as the "primary election spending limit" (but only to the extent that the sum exceeds that threshold amount).

6. There are three components of the "matching funds" provision of the Clean Elections Act operate during the general election season. The first component gives to every participating candidate, an amount of money equal to the reported excess of moneys contributed to any traditional candidate's campaign during the primary season less expenditures made during the primary season. The second component gives to a participating candidate an amount of money equal to the reported (or unreported but discovered) expenditure of an independent party, such as a political action committee, in support of any traditional candidate's campaign or against that participating candidate's campaign. The third component gives to a participating candidate an amount of money equal to the reported (or unreported but discovered) contributions given during the general election period to any traditional candidate's campaign committee, less six percent. All three matching funds components are triggered for a participating candidate only once the sum of unspent primary election contributions for traditional candidates, independent expenditures in opposition to that participating candidate, independent expenditures in support of any traditional candidate, and contributions to any traditional candidate exceeds a certain threshold amount for that participating candidate, which the Commission specifies as the "general election spending limit" (but only to the extent that the sum exceeds that threshold amount).

7. I spent approximately $44,585.23 on campaign communications during the 2008 primary election. I believe my opponent and traditional candidate Sam Crump spent $48,290.31 on campaign communications during the 2008 primary election. Together, these amounts exceeded the primary election spending limit of $19,382.00, and triggered $31,554.20 in "equalizing" matching funds to my opponent and participating candidate, Carl Seel. In addition, independent expenditures that were not coordinated with my campaign triggered another $7,209.80 to my opponent, Carl Seel. In short, Carl Seel received the maximum amount of matching funds available under the Act. This can be verified at the Arizona Secretary of State's website, http://www.azsos.gov/cfs/PublicReports/2008/B255793D-95CA-4C13-8B49-BCEE1B493462.pdf, and at the Arizona Citizens Clean Elections Commission's website, http://www.azcleanelections.gov/electiondata/2008.aspx, which are publicly available and incorporated herein by reference. As shown in the attached exhibit, which is a genuine printout from the Arizona Secretary of State's website at http://www.azsos.gov/cfs/CCECFundingOverview.aspx?id=200810146&cid=8&eid=1, My campaign expenditures on communicating with potential supporters and constituents together with the independent expenditures of my supporters caused the dissemination of communications that were hostile to my candidacy during the 2008 primary election.

8. Based on my direct experience during the 2008 primary election cycle as a candidate for elected

office, independent expenditures are seldom as effective in supporting a candidate's campaign as expenditures made directly by the candidate. I believe I am placed at a relative competitive disadvantage when independent expenditures trigger matching funds for opposing participating candidates. This is because I have no control over independent expenditures that the Commission deems benefit me, but my participating opponent will have absolute control over the related matching funds that are triggered by such independent expenditures. Additionally, during the primary election, I feel compelled to conserve money for damage-control in anticipation of poorly-conceived independent expenditures backfiring after they trigger matching funds to their opponents. That money would otherwise have been spent on exercising their right to campaign speech, promoting their political ideas and educating the public.

9. During my primary election campaign in 2008, my speech was chilled from the moment I understood the general idea of matching funds, which would have been shortly after registering – on or about April 14, 2008. However, the full impact of my experience of the chilling effect took place following three events shown in the genuine print-out from the Arizona Secretary of State's website, which was previously filed in this case under ECF Doc. 13-6, and is incorporated herein by reference (I have reviewed the document before signing this declaration). The first, on or about July 10, 2008, was when I observed how the expenditures of my opposing traditional

candidate, Sam Crump, triggered matching funds to Carl Seel. The second, on or about August 8, 2008, took place when I was angered to discover an independent expenditure had been credited against me that triggered matching funds to Carl Seel. The third, on or about August 13, 2008, occurred when I was outraged to discover the full magnitude of funds that were triggered to Carl Seel from expenditures made by my campaign. Those events cumulatively brought a sense of the real disadvantages of the matching funds system in a way that no previous understanding had brought me. It discouraged me greatly that someone could do nothing and benefit from my fundraising efforts. Also, like most traditional candidates I know, I became increasingly fearful that I would lose control over my campaign tactics and strategies, including my campaign message, if the promotion of my campaign caused an unexpected independent expenditure to be made that triggered equally unexpected matching funds to my opposing participating candidate. These concerns caused me to immediately change my campaign strategy by essentially ceasing the promotion of my campaign and holding my campaign speech until my expenditures could be timed to minimize the impact of the matching funds provisions matching funds. In addition, triggered monies to the participating candidate were not disclosed in a timely matter. The Secretary of State website that posted the triggered monies was and, I believe, still is several days behind the actual dispersing of the money. That placed me at a continuous tactical disadvantage due to my

uncertainty over the timing and amounts of disbursement related to independent expenditures.

10. On or about August 13, 2008, I decided to wait until the last possible minute, just days before the primary election date, September 2, 2008, to spend money on my campaign to ensure that the matching funds my opposing participating candidate would receive cannot be utilized effectively. I made this decision because I knew that the primary election date was a Tuesday, following a three day weekend; this meant that the mail would not be delivered Sunday or Monday, so I decided to wait until August 28, 2008 to send out most of my mailers. I also spent no more than $550 promoting my campaign between August 5, 2008 and August 26, 2008, despite having approximately $10,000 to spend promoting my campaign during that same time frame. As a result, the matching funds provisions of the Act caused the public to have less time to deliberate over substantially less information about my campaign than the public would otherwise have had. The Act's matching funds provisions also caused me to self-censor until the last days of the election rather than sending out mailers, making auto calls, and passing out information door-to-door to give voters more time to read and do research necessary to decide on their candidates.

11. Furthermore, in my experience, campaign fundraising costs substantially exceed 6% of the gross amount of contributions received. My actual out-of-pocket expenses for raising money to support my

2008 primary campaign was approximately 14% of the total amount raised. This meant that my participating opponent net 8% more purchasing power out of the matching funds he received than I received from the original contribution. This is a significant difference when tens of thousands of dollars are being spent on a campaign, as was the case in my campaign.

12. I also sustained far greater opportunity costs associated with raising money to support my campaign than did my opposing participating candidate. I conservatively estimate spending at least 80 hours engaged in fundraising activities during the primary election. Additionally, the reporting process itself requires significant opportunity costs in time. I personally recorded over 200 transactions in my 2008 primary campaign. Each one of these transactions requires not less than four minutes, and as much as three hours. The shortest time for reporting a particular transaction assumes my computer is already on, that I spend around 2 minutes navigating through multiple websites, that I spend a minute and a half calling the donor to verify that his contact information is correct, and that I spend approximately 30 seconds inputting the donor's information. This amount of time represents about 90% of the transactions I have recorded. However, quite often, I find myself spending enormous amounts of time processing contributions. One example involves a check I received from another contributor for $25. No address was on the money order from First Credit

Union. There was no phone number on the check to call and only the First Credit Union address. First Credit Union is unable to provide me with the donor's contact information. These investigations into the identity of this donor wasted at least 30 minutes of my time. Another example involves the approximately 30 minutes spent tracking down a married couple who gave my campaign $780 without both spouses signing the check; this was necessitated because I am required to obtain both parties' signatures on checks over $390. At least 2% of my contribution transactions have involved expenditures of time similar to these examples.

13. In sum, I have had opportunity costs at least equal to the value of at least 90 hours of my personal and professional life researching and complying with the reporting requirements of the Act, as well as fundraising. These were not costs borne by my opposing participating candidate, Seel.

14. By failing to adjust matching funds to reflect the actual fundraising costs, both out-of-pocket and opportunity costs, incurred by traditional candidates in the determination of matching funds, A.R.S. § 16-952(A) and (B) ensure that participating opponents will almost always have more financial and personal resources than privately financed candidates to conduct their campaign.

15. The independent expenditure matching funds provision, A.R.S. § 16-952(C), also skews electoral competition in favor of participating candidates.

It requires the payment of matching funds to participating candidates who face traditional opponents whenever an independent campaign expenditure is made that either opposes the participating candidate or supports the traditional candidate. By comparison, no benefit whatsoever accrues to a traditional candidate, such as myself, when independent expenditures are made to oppose a traditional candidate or otherwise to support a participating candidate. Additionally, the matching funds received by participating candidates as a result of independent expenditures deemed to support a traditional candidate or oppose the participating candidate can be used much more efficiently to advance the candidacy of the participating candidate. In fact, during the 2008 primary election cycle, an independent expenditure by a Sportsman's PAC was made (under the name Vend PAC or Print PAC as shown in the attached exhibit) that was completely ineffective and which triggered funds to Seel, enabling Seel to use the same money much more effectively against me.

16. Relatedly, I note the suspicious circumstances of the $1,500 independent expenditure made by the Arizona Cattlemen's Association PAC, on or about August 8, 2008, which advocated for traditional candidate Sam Crump (who was the incumbent) and myself. The monies triggered to the participating candidate, Seel, supported his continued attacks on my candidacy, while he remained silent about Representative Crump's incumbent candidacy. Then, on or about August 18, 2008, Representative Crump

officially endorsed Seel and Representative Crump proceeded to engage in campaign speech opposing my campaign. I have previously attached as an Exhibit to my prior declaration a genuine copy of the related campaign literature that I received, which based on its apparent return address, I believe originates with the campaign of my opposing participating candidate, Seel (incorporated by reference is ECF doc. 13-7, which I have reviewed before signing this declaration).

17. The independent expenditure done purportedly to support Crump and myself, which triggered money to Seel, actually caused net damage to my candidacy by promoting both of my opposing candidates, who revealed themselves shortly thereafter as an effective slate for the two seats in my district. Regardless of whether this series of events was coordinated by the two campaigns – and I express no opinion as to whether it was or not – the Act's matching funds provisions certainly lend themselves to the appearance of my district's primary election being manipulated by a special interest to generate matching funds for a participating candidate who is teamed with the interest's endorsed traditional candidate. This does not help prevent corruption or the appearance of corruption, but works instead to undermine public confidence in the system by appearing to amplify the influence of private financing. I believe similar coincidences or contrived events are occurring across many districts during the primary election season so as to cause the matching funds

provisions of the Act to cast a pall over the reality of opposing campaigns and the legitimacy of Arizona's statewide elections.

18. I did not prevail in the primary election of the 2008 election cycle. But I intend to be a traditional, privately-financed candidate for Arizona State House of Representatives, Legislative District 6, for the 2010 election cycle.

19. Although I have not formally declared my candidacy, I have taken steps towards running for office. These steps include: a) currently serving as a Republican Party precinct captain; and b) being elected and currently serving as a state committeeman for the Republican Party.

20. I anticipate that I will face one or more participating opposing candidates in the 2010 election cycle based on the fact that there is a history of participating candidates running for office in Legislative District 6. Additionally, I anticipate that I will face one or more such opposing candidates because it is my understanding that a majority of candidates running for state legislative office were participating candidates in the 2008 election cycle, which makes it more likely I will face a participating candidate than not.

21. Based on my experience running for office in Legislative District 6 during the 2008 election cycle, I am certain that raising and spending money to get my name and message out is essential to winning an election. I am also convinced that the same is true of

any candidate with whom I am in competition. Accordingly, for candidates, like myself, matching funds impose a "cost," or competitive disadvantage, in raising and spending money that would not exist in a world without matching funds. As I have no intention to manipulate the Act's matching funds provision by teaming with a participating candidate, that means I will seek to minimize that cost by minimizing fundraising or spending to minimize matching funds or I will alter my mode of fundraising and spending in ways that minimize the benefit of matching funds to my competitor.

22. If the matching funds provision of the Arizona Citizens Clean Elections Act is still being enforced during the 2010 election cycle, I will attempt to minimize the competitive disadvantage created by my campaign expenditures during the primary election either by refraining from making campaign expenditures that I would otherwise make in the absence of matching funds or by adopting a tactic of delaying my expenditures in such a manner as to minimize the benefit any participating candidate may receive from matching funds. This amounts to self-censorship because in order to avoid disseminating viewpoints that are hostile to my candidacy matching funds will cause me to refrain from engaging in communication at times and in manners that I would not otherwise choose.

23. Taken together, I believe the Act's matching funds provisions not only create a "drag" on the exercise of my First Amendment right (and that of my

supporters) to engage in campaign speech as discussed above, but even if that drag is disregarded, the Act establishes a discriminatory legal framework that systematically causes competitive electoral processes to generate more speech and more effective speech to the benefit of participating candidates, like Mr. Seel, than to the benefit of traditional candidates, like myself

24. I do not believe that the Act's matching funds provision deters corruption or the appearance of corruption. As I understand the Act, a participating candidate will no longer receive matching funds after he has received funds equal to three times the applicable spending limit. This means that the only traditional candidate whose speech will not be chilled by the Act is one who feels confident in raising enough private money or inspiring enough independent expenditures that the reported spending or contributions on his campaign will substantially exceed three times the spending limit. Not only that, the Act would furnish such a candidate a significant advantage over those candidates who remain in the system, because those left in the system would have their speech limited at three times the spending limit. The fact that the Act creates a competitive advantage for candidates who benefit from massive campaign expenditures belies the claim that the Act protects against corruption or the appearance of corruption supposedly caused by massive private campaign expenditures or contributions.

25. Additionally, based on my ongoing periodic conversations with numerous individuals involved in Arizona state politics in my legislative district since 2006, the Act's matching funds system has developed and currently has a reputation of being manipulated by candidates, and those who support them. For example, whether the allegations are true or not, the 2006 primary election process in State of Arizona Legislative District 10 was reputedly manipulated by supporters of what was called a "team" of traditional and participating candidates, whereby money was reportedly spent on the traditional candidate in order to trigger matching funds to the participating "teammate" candidate. Additionally, as shown in the attached exhibit, it is apparent that the Clean Elections Commission continued to award matching funds in the total amount of $12,574.25 to Carl Seel based on the expenditures made by Sam Crump on August 14, 28 and 29, 2008, long after everyone should have known about the teaming between Crump and Seel. In effect, Sam Crump and his contributors were contributing to Carl Seel's campaign far in excess of any applicable contribution limits, courtesy of the Clean Elections Act.

26. I do not believe such gamesmanship possibilities prevent corruption or prevent the appearance of corruption. Instead, I believe they undermine the legitimacy of the election process. And to the extent that traditional candidates effectively evade contribution limits by triggering matching funds to their teammates, such gamesmanship creates the very

appearance of corruption that contribution limits supposedly prevent. The reputation of the Act's matching funds system as enabling deceptive and dirty politics is confirmed by the New Times' recent cover story and investigative piece on the Clean Elections system, "The Dirty Truth About Clean Elections," which is available here: http://www.phoenixnewtimes.com/2009-04-02/news/the-dirty-truth-about-clean-elections/, and incorporated by reference.

I, Tony Bouie, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 2nd day of June 2009.

/s/ Tony V. Bouie
Tony Bouie

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION GOLDWATER INSTITUTE
Nicholas C. Dranias
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462 5000/F: 602-256-7045
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, AND TONY BOUIE, Plaintiffs, v. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants.	No. CV-081550-PHX-ROS Hon. Roslyn O. Silver, presiding **DECLARATION OF JOHN MCCOMISH IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I was a candidate for Arizona State House of Representatives, Legislative District 20, for the Republican primary election. I am now a member of the House. I was born and raised in Youngstown, Ohio. My highest degree of education is a B.A. from Colgate University, which I received in 1965. My wife Karen is a school teacher in the Kyrene District. We have two children and three grandchildren. I previously worked for such major corporations as Procter & Gamble and Johnson & Johnson. Prior to serving in the legislature I owned my own small business, then was hired as CEO for the Ahwatukee Foothills Chamber of Commerce for ten years.

3. I began my candidacy for the 2008 election cycle when I registered with the Arizona Secretary of State on January 4, 2007. I did not register as a subsidized, "participating" candidate under the Arizona Clean Elections Act, but as a traditional, privately-funded candidate. I previously ran for election and served as a state Representative in 2002, 2004 and 2006.

4. Due to my participation in the instant litigation and past experience as a candidate in Arizona state politics, I am now very familiar with the rules

and regulations of the Arizona Citizens Clean Elections Commission. Based on my current familiarity with the Clean Elections Act and my compliance with the reporting requirements of the Act during the 2008 election cycle, my understanding of the way the "matching funds" provision of the Clean Elections Act operate during the primary and general election season is as follows.

5. There are two components of the "matching funds" provision of the Act during the primary election season. The first component gives to a candidate who is participating in the subsidies furnished by the Act ("participating candidate"), an amount of money equal to the reported (or unreported but discovered) expenditure of any independent party, such as a political action committee, in support of any traditional candidate's campaign or against that participating candidate's campaign. The second component gives to a participating candidate an amount of money equal to the reported (or unreported but discovered) expenditure of any competing traditional candidate campaign committee in support of the traditional candidate's campaign or against that participating candidate's campaign, less six percent and any early private contributions that the participating candidate may have obtained from individuals, including registered lobbyists, as authorized under section 16-945 of the Act. Both matching funds components are triggered for a participating candidate once the sum of independent expenditures in opposition to that participating candidate, independent expenditures in

support of any traditional candidate, direct expenditures in support of any traditional candidate, and direct expenditures in opposition to that participating candidate exceeds a certain threshold amount for that participating candidate, which the Commission specifies as the "primary election spending limit" (but only to the extent that the sum exceeds that threshold amount).

6. There are three components of the "matching funds" provision of the Clean Elections Act operate during the general election season. The first component gives to every participating candidate, an amount of money equal to the reported excess of moneys contributed to any traditional candidate's campaign during the primary season less expenditures made during the primary season. The second component gives to a participating candidate an amount of money equal to the reported (or unreported but discovered) expenditure of an independent party, such as a political action committee, in support of any traditional candidate's campaign or against that participating candidate's campaign. The third component gives to a participating candidate an amount of money equal to the reported (or unreported but discovered) contributions given during the general election period to any traditional candidate's campaign committee, less six percent. All three matching funds components are triggered for a participating candidate only once the sum of unspent primary election contributions for traditional candidates, independent expenditures in opposition to that participating

candidate, independent expenditures in support of any traditional candidate, and contributions to any traditional candidate exceeds a certain threshold amount for that participating candidate, which the Commission specifies as the "general election spending limit" (but only to the extent that the sum exceeds that threshold amount).

7. Based on my experience running for office in Legislative District 20 during the 2008 election cycle, and in prior years, I am certain that raising and spending money to get my name and message out is essential to winning an election. I am also convinced that the same is true of any candidate with whom I am in competition. Accordingly, for candidates, like myself, matching funds impose a "cost," or competitive disadvantage, in raising and spending money that would not exist in a world without matching funds.

8. If the matching funds provision of the Arizona Citizens Clean Elections Act is still being enforced during the 2010 election cycle, I will attempt to minimize the competitive disadvantage created by my campaign expenditures during the primary election either by refraining from making campaign expenditures that I would otherwise make in the absence of matching funds or by adopting a tactic of delaying my expenditures in such a manner as to minimize the benefit any participating candidate may receive from matching funds. Likewise, if I succeed in the primary and compete during the general election, I will attempt to minimize the competitive advantage

created by my campaign fundraising either by refraining from seeking campaign fundraising or by refusing to accept campaign contributions significantly above the general election spending threshold. This amounts to self-censorship because I will refrain from engaging in communication at times and in manners that I would otherwise choose in order to avoid disseminating viewpoints that are hostile to my candidacy.

9. Matching funds also discriminate against traditional candidates like myself and in favor of participating candidates, especially where multiple participating candidates face a traditional candidate. This is illustrated by the impact of both my expenditures and independent expenditures during the 2008 election cycle. I have attached as an exhibit (JM 1) a genuine copy of a printout from the Arizona Secretary of State's official public campaign finance website indicating the public financing received by my primary opponents as of August 25, 2008.

10. As shown in JM 1, based on my reported expenditure of approximately $43,080.40, on or about August 7, 2008, my participating opponent Jeff Dial was given $14,755.64, in addition to his prior public financing of $19,382.00, on or about August 8, 2008, my participating opponent Andy Swan was given $13,864.90 in matching funds in addition to his prior public financing of $19,382.00, and on or about August 14, 2008, my participating opponent Frank Schmuck was given $13,665.64 in matching funds in addition to his prior public financing of $19,382.00. In

short, as shown in JM 1, by August 14, 2008, based on my reported expenditure of $43,080.40, my participating opponents received a total of $42,286.18 in addition to $58,146.00 in lump sum public financing, or nearly $100,000 collectively versus my expenditure of $43,080.40. Additionally, as shown in JM 1, between on or about July 31, 2008 and August 14, 2008, the "Protect Arizona's Future" organization spent a combined total of approximately $11,417.98 on independent expenditures supporting candidate Andy Swann. As a result, Schmuck and Dial each received $10,732.90 in matching funds. And while a total of $21,465.80 was handed by the Commission to my participating opponents, I received nothing despite the fact that I was competing with Swann just as much as Schmuck and Dial. Then, on or about August 14, 2008, as shown in JM 1, a campaign mailer to support me was distributed to homes in District 20 (Independent Expenditure by the Arizona Association of Realtors). This $6,500.00 independent expenditure triggered a matching sum to each of my three opponents in the amount of $6,110.00 each. However, the message in the mailer was not consistent with my strategy or themes, and it did not arrive at a time most efficient for me. For comparison, I've attached as an exhibit (JM 2) a copy of an example of my campaign literature and as another exhibit (JM 3) a copy of the foregoing mailer that triggered a total of $18,330.00 to my opponents in the primary. It is simply impossible that I received $6,500.00, let alone $18,330.00 in value from this independent expenditure. As shown, the Arizona

Association of Realtors piece did not reinforce my campaign image or theme. Therefore, the independent expenditure done on my behalf was not money well spent, yet my three opponents received cash that they could spend efficiently on their campaign. So, through no fault of my own, my opponents benefitted significantly more than I did – and nearly $19,000 was spent efficiently against me, but only $6,500 spent *inefficiently* for me.

11. By August 20, 2008, the anti-competitive reality of the "multiplier" effect of matching funds hit me hard. My opponents had received a total of $82,081.98 in matching funds, plus their original $58,146.00 lump sum of public financing, for a grand total of $140,227.98 as against direct and independent expenditures in support of my campaign of less than $50,000.[1] At that time, as shown in JM 1, none of my three participating opponents had reached their matching funds caps – JM 1 indicates that as of August 25, 2008 a total amount of $21,636.99 in matching funds remained to be distributed to my opponents. Because of this fact, on or about August 20, 2008, in separate discussions with Representative

---

[1] For unknown reasons to me, JM 1 inaccurately represents that I spent an additional $45,664.14 on August 20, 2008, presumably indicating I spent a total of $88,744.54 during the primary election. This is absurd and untrue. In the primary, I spent no more than $48,317.08 on campaign communications. This can be verified here at the Arizona Secretary of State's website: http://www.azsos.gov/cfs/PublicReports/2008/6E14F22B-8AAC-487E-B2C1-894F380D6D17.pdf.

Bob Robson and Consultant Kyle Moyer, I decided not to spend money on an "auto-dialer" campaign marketing program (with an approximate cost of $2,500) because my opponent would get a matching amount of funding. Together, the fact that my expenditures and the ineffective independent expenditures of my supporters triggered matching funds in such huge multiples of any dollar value my candidacy might obtain, this resulted in my decision to wait and not to make any substantial expenditures until September 2, 2008. In other words, I engaged in self-censorship because the Act's matching funds provisions caused my campaign expenditures and those of my supporters to disseminate viewpoints hostile to my campaign.

12. Despite being drowned out by matching funds, I prevailed in the primary and general elections of the 2008 election cycle – just barely. Although I have not formally declared my candidacy, I intend to be a traditional, privately-financed candidate for Arizona State House of Representatives, Legislative District 20, for the 2010 election cycle. During the 2010 primary election, as in prior election years, I will likely face several opponents, including one or more participating candidates. I would face real competition in the primary for which the ability to raise and spend every single dollar of campaign money to get my name and message out will be crucial. I know this because I nearly lost the 2008 Republican primary. I beat my nearest competitor, Frank Schmuck, by only 67 votes or about 0.3% of the total (this

statement can be verified at the Arizona Secretary of State's website at http://www.azsos.gov/election/2008/Primary/Canvass2008PE.pdf). And my need to raise and spend money to support my candidacy will not diminish in the general election.

13. Assuming I am nominated as the Republican candidate in the 2010 general election, this means I will be competing not only against the current Democratic incumbent Rae Waters, but also effectively against whichever Republican colleague is nominated alongside myself. This is real competition – I nearly lost to my Republican colleague, Jeff Dial, in the 2008 general election, beating him by only 2,856 votes or about 2.5% of the total. And I only beat Ms. Waters by 2,181 votes or less than 2% of the total in the 2008 general election (this statement can be verified at the Arizona Secretary of State's website at http://www.azsos.gov/election/2008/General/Canvass2008GE.pdf).

14. As the 2008 election cycle shows, for the 2010 election cycle, every single dollar will count. Not only that, but the discriminatory effect of matching funds will be especially damaging to my candidacy because the Democratic Party and its supporting political action committees are well aware of the vulnerability of my seat. Victory 2008 poured independent expenditures into the 2008 general election to support my opponent Rae Waters. As shown in Exhibit JM 4, which is a true and accurate printout from the Arizona Secretary of State's official public

campaign finance website, Victory 2008 spent approximately $18,000 in support of Waters during the 2008 general election.

15. Taken together, I believe the Act's matching funds provisions not only create and threaten to create a "drag" on the exercise of my First Amendment right (and that of my supporters) to engage in campaign speech as discussed above, but even if that drag is disregarded, the Act establishes a discriminatory legal framework that systematically causes competitive electoral processes to generate more speech and more effective speech to the benefit of participating candidates, than to the benefit of traditional candidates, like myself – especially where the traditional candidate, as I did, faces a multiplier effect from matching funds being triggered to multiple participating candidates.

16. I do not believe that the Act's matching funds provision deters corruption or the appearance of corruption. It is common knowledge among political strategists in Arizona that the Act's matching funds provision can be gamed. For example, during August 2008, I had a casual conversation with Kevin DeMenna and Kyle Moyer in their respective offices during which each discussed the possibility of a gay rights organization conducting independent expenditures to support a more conservative candidate for the purpose of torpedoing his or her campaign. I later learned that Equality Arizona, a gay rights organization, had sent out a blast email during the first week of August 2008, during the primary, lauding

Republican candidate Eddie Farnsworth, a well-known social conservative, for his willingness to work with gay rights advocates. Additionally, in my legislative district during the 2008 general election, Jim Torgeson, a registered Democrat, repeatedly posted signage identifying Democratic house candidate Rae Waters and senate candidate Ted Maish, stating "they promised to raise taxes help them keep the promise."

17. The attached exhibit (marked "JM 5") is a true and accurate photocopy of a genuine photograph of Torgeson's sign. This sign could have triggered matching funds for my Republican opponent Jeff Dial, and may have been intended to do so, but, as I understand it, the Clean Elections Commission ultimately awarded matching funds to Waters instead. This illustrates how discriminatory the matching funds system is even when it tries to correct for possible gamesmanship. Whatever its real purpose, Torgeson's sign simply did not help my campaign. It does not identify me, it does not identify my image and it does not convey my message. To the extent that it is viewed as gamesmanship and it is associated with Republicans, voters could have reacted negatively against Republicans due to the sign. And yet, I understand that the full asserted value of the expenditure (less 6%) was tendered by the Commission to Waters as matching funds to be spent efficiently by Waters on her campaign.

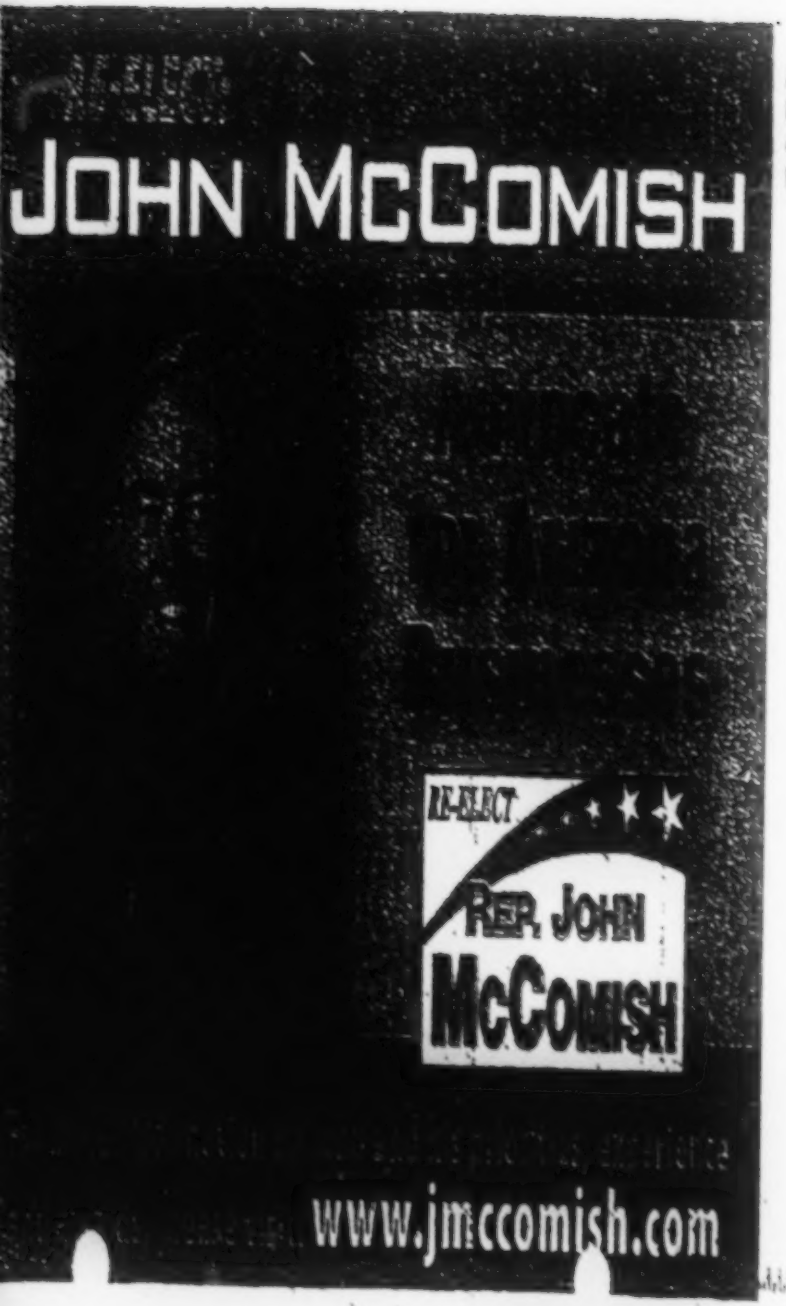
18. It is common knowledge that similar "reverse targeting" signage was posted elsewhere during the 2008 general election, and, based on my

past experience as a candidate in Arizona, these tactics are becoming increasingly commonplace as political actors and consultants realize the gaming possibilities matching funds allows. In fact, based on my political experience and knowledge of my district, the Clean Elections system now has a clear reputation of being the "dirty elections system" because of scandals involving participating candidates disregarding spending limitations, as well as actual and potential gaming of the matching funds system, which replicate all of the supposed corrupting elements of the private campaign financing system. This reputation is confirmed by the New Times' recent cover story and investigative piece on the Clean Elections system, "The Dirty Truth About Clean Elections," which is available here: http://www.phoenixnewtimes.com/2009-04-02/news/the-dirty-truth-about-clean-elections/, and incorporated by reference.

I, John McComish, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this June 9, 2009.

/s/ John McComish
John McComish



Paid for by:
FRIENDS OF JOHN McCOMISH
4403 East Desert View Dr.
Phoenix, AZ 85044

EXHIBIT
JMZ

P802

BEST AVAILABLE COPY

Courageous Leadership...

Representative
John McComish
sees what is
possible, and is
willing to do what
is needed to make
Arizona a better
place to live, work
and raise a family.

Arizona Association of
REALTORS® Leadership Committee
255 E. Osborn Rd.
Suite 200
Phoenix, AZ 85012
(602) 265-7787

U.S. POSTAGE
PAID
PHOENIX, AZ
PERMIT NO. 3415

7/13/08

EXHIBIT
Inv 3

THE MCCOMISH FAMILY
4463 E DESERT VIEW DR
PHOENIX, AZ 85044-1117

EXHIBIT
SMS